SEP 13

MICHAEL RODAK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-2721

THE SEMINOLE NATION OF OKLAHOMA,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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No.

THE SEMINOLE NATION OF OKLAHOMA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioner, the Seminole Nation of Oklahoma, respectfully petitions the Court to grant a writ of certiorari to the United States Court of Claims to review its decision of June 19, 1974, 204 Ct. Cl. __, 497 F.2d __, affirming the findings, opinion and final orders of the Indian Claims Commission, entered May 31, 1972, 28 Ind. Cl. Comm. 117-145, reh. den., January 26, 1973, 29 Ind. Cl. Comm. 421, which denied recovery to petitioner herein, and withdrew earlier findings of fact, opinion and interlocutory order of said Commission entered June 24, 1966, 17 Ind. Cl.

Comm. 67-96, in favor of petitioner, and based upon the fair and honorable dealings jurisdictional provision of Section 2, Clause 5 of the Indian Claims Commission Act of August 13, 1946, c. 959, 60 Stat. 1049, 1050. Said final order of the Commission of May 31, 1972, affirmed by the Court of Claims, also overruled the Order of the Commission dated July 7, 1971, 26 Ind. Cl. Comm. 7, denying respondent's motion to dismiss petitioner's claim for failure to prove damages as of June 30, 1908.

The opinion of the Court of Claims, entered on June 19, 1974, is not as yet reported (204 Ct. Cl.__, 497 F. 2d __), and is printed as Appendix A to this petition. The findings, opinion and orders of the Indian Claims Commission, entered May 31, 1972, 28 Ind. Cl. Comm. 117-145, and order of January 26, 1973, 29 Ind. Cl. Comm. 421, are printed as Appendix B to this petition. The findings, Opinion, and Order of the Indian Claims Commission, dated June 24, 1966, 17 Ind. Cl. Comm. 67-96, and the Order of the Commission dated July 7, 1971, 26 Ind. Cl. Comm. 7, are printed as Appendix C to this petition.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of the Indian Claims Commission Act of August 13, 1946, c. 959, §20(c), 60 Stat. 1049, 1055, as supplemented and amended by Act of September 8, 1960, Pub. Law 86-722, 74 Stat. 821, 829 (25 U.S.C. 70s(c)), and also under 28 U.S.C. §1255.

The Indian Claims Commission Act was amended and extended to April 10, 1972 by Acts of July 24, 1956, c. 679, 70 Stat. 624, and June 16, 1961, Pub. Law 87-48, 75 Stat. 92; and by Act of April 10, 1967, Pub. Law 90-9,

§1, 81 Stat. 11; and by the Act of March 30, 1972, Pub. Law 92-265, §1, 86 Stat. 114, extending the life of the Indian Claims Commission Act until April 10, 1977.

AUTHORITIES INVOLVED

The Original Agreement between the United States and the Seminole Nation of Oklahoma, dated December 16, 1897, and ratified by Act of July 1, 1898, c. 542, 30 Stat. 567, is printed as Appendix D to this petition.

Section 8 of the Act of March 3, 1903, c. 994, 32 Stat. 982, 1008; Section 1 of the Act of April 21, 1904, c. 1402, 33 Stat. 189, 204-205; Joint Resolution of March 2, 1906, P.R. 7, 34 Stat. 822; Sections 6 and 28 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, 139, 148; Section 11 of the Act of May 27, 1908, c. 199, 35 Stat. 312, 316. Sections 2 and 20(c) of the Indian Claims Commission Act, approved August 13, 1946, c. 959, 60 Stat. 1049, 1050, 1055, are printed as Appendix E to this petition.

QUESTIONS PRESENTED

Whether the Court of Claims erred in affirming the 1972 findings, opinion, and final orders of the Indian Claims Commission herein, and was thereby in conflict with decisions of this Court, Federal Circuit Courts of Appeal, and of prior decisions of the Court of Claims:

1. In holding that no tribal property right in minerals and mineral royalties was reserved to the Seminole Nation under the 1898 Seminole Agreement with the United States, and that "the agreement established an express trust with the tribal government as trustee and the individual allottees as beneficiaries" (App. p. 15a), when said agreement

expressly provided that (a) all mineral leases were to be made with the tribal government with the consent of the allottee and the approval of the Secretary of the Interior; (b) that a one-half interest in all minerals and royalties was reserved to the tribe; (c) that said royalties were to be deposited in the tribal treasury for equalization of the value of all allotments; and (d) that said tribal funds were to be disbursed only when the tribal government ceased to exist, an event which has not as yet taken place?

Express trust theory in conflict with:

Cherokee Nation v. Hitchcock, 187 U.S. 294, 307 (1902); *Ligon, et al. v. Johnston, et al.*, 164 F.2d 670, 672 (1908), cert. den., 223 U.S. 741 (1911).

Individual allottees interest in conflict with:

United States v. Jim, et al., 409 U.S. 80, 82 (1972), reh. den., 409 U.S. 1118 (1973); *In re Dennison*, 38 F.2d 662, 664 (1930), app. dis. 45 F.2d 585 (1931); *Taylor v. Tayrien, et al.*, 51 F.2d 884, 887, cert. den., 284 U.S. 672 (1931).

2. In failing to hold that the Act of April 26, 1906, c. 1876, 34 Stat. 137, 139, continued the Seminole Nation's property interest in minerals and royalties expressly reserved to it under the 1898 Agreement, under which deeds to allotted lands were directed to be withheld until the Seminole tribal government ceased to exist, when Section 28 of the 1906 Act, 34 Stat. 137, 148, continued the tribal government "until otherwise provided by law", and Section 6 merely authorized the principal chief of the Seminole Nation to execute deeds before extinguishment of the tribal government?

In conflict with:

Gritts v. Fisher, 224 U.S. 640, 644-645 (1912); *Choctaw Nation, et al. v. Oklahoma, et al.*, 397 U.S. 620, 627, 638-639, reh. den., 398 U.S. 945 (1970).

3. In holding that under Section 2, Clause 5 of the Indian Claims Commission Act, relative to fair and honorable dealings, the United States, after executing a solemn agreement with an Indian tribe, in which the tribe reserved certain property rights, can subsequently and unilaterally alter without liability the provisions of said Agreement so as to destroy the reserved tribal property rights without the knowledge and consent of the tribe, or without giving it an opportunity to be heard?

In conflict with:

United States v. Kiowa, Comanche and Apache Tribes, 143 Ct. Cl. 534, 537-541, 163 F. Supp. 603, 606-608, recon. den., 143 Ct. Cl. 545, 166 F. Supp. 939 (1958), cert. den., 359 U.S. 934 (1959); *Navajo Tribe v. United States*, 176 Ct. Cl. 502, 508-510, 364 F.2d 320, 322-324 (1966).

4. In failing to hold that the United States, having full administrative control over the property and affairs of the Seminole Nation, also the duty to control and manage the Seminole tribal property, and the duty to carry out faithfully the provisions of the 1898 Seminole Agreement, as guardian of the Seminole Nation, could not unilaterally destroy a valuable tribal property right in minerals and mineral royalties reserved to the tribe under said Agreement, without providing compensation therefor; and also in failing to hold that in carrying out its treaty and agreement obligations with the Seminole Nation, the conduct of the

United States, as such guardian, should be judged by the "highest fiduciary standards"?

In conflict with:

United States v. Creek Nation, 295 U.S. 103, 109, 110, reh. den., 295 U.S. 769 (1935); *Seminole Nation v. United States,* 316 U.S. 286, 296, 297 (1942); *Navajo Tribe v. United States, supra,* p. 507.

5. In approving the Commission's holding that the decisions involving legal and equitable claims in *Moore v. Carter Oil Co.,* 43 F.2d 322 (1930), cert. den., 282 U.S. 903 (1931); *Fish v. Wise,* 52 F.2d 544, 545 (1931), cert. den., 284 U.S. 688 (1932); *Goat v. United States,* 224 U.S. 458 (1912), are applicable to the fair and honorable dealings claim in this case, a moral claim, made available to petitioner for the first time under Section 2, Clause 5 of the Indian Claims Commission Act of 1946?

In conflict with:

Hynes v. Grimes Packing Co., 337 U.S. 86, 103, fn. 22 (1949); *Creek Nation v. United States,* 168 Ct. Cl. 483, 490, ff. (1964).

6. In holding that under the principles of fair and honorable dealings, petitioner cannot seek to have the Commission inquire into the history of Section 11 of the 1908 Act in order to show that the passage thereof was secured by the United States without the knowledge and consent of the Seminole Nation, and without giving the tribe an opportunity to be heard, in making determinations under the fair and honorable dealings clause of the Indian Claims Commission Act?

In conflict with:

Western Cherokee Indians, et al. v. United States, 114 Ct. Cl. 716, 722, 723, 86 F. Supp. 981, 983, 984 (1949); *Assiniboine Tribe v. United States,* 128 Ct. Cl. 617, 631, 121 F. Supp. 906, 915, cert. den., 348 U.S. 863 (1954); *United States v. Kiowa, Comanche and Apache Tribes, supra. Creek Nation v. United States,* 168 Ct. Cl., *supra,* 493-496.

7. In failing to remand the case to the Indian Claims Commission because the Commission failed to make findings of fact pertinent and material to the issue of liability of the United States under fair and honorable dealings when there was substantial evidence in the record in support thereof?[1]

In conflict with:

Seminole Nation v. United States, 316 U.S. 286, 300, 305-307 (1942); *Miami Tribe, et al. v. United States,* 146 Ct. Cl. 421, 469, 175 F. Supp. 926, 954 (1959).

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[1] Namely, whether "the acts of the Commissioner of Indian Affairs which underly the liability include the sequential offering of Section 11 and its proviso upon occasions when the Seminole Nation would be least able to counteract the offer; failure to afford the Seminole Nation any opportunity to be heard on the subject; and misrepresentation of the measure as a mere correction of a minor inconsistency.***"? (App. p. 57a).

8. In upholding the Commission's conclusion in its opinion, unsupported by any finding or substantial evidence, that "The Commissioner of Indian Affairs acted pursuant to the ministerial powers granted him in the 1898 Agreement" (App. p. 15a), in secretly obtaining the passage of Section 11 of the 1908 Act, thus divesting the Seminole Nation of its reserved mineral property rights and royalties without the tribe's knowledge and consent, and without giving it an opportunity to be heard?

In conflict with:

Saltonstall v. Birtwell, 150 U.S. 417, 419 (1893); *United States v. Wells*, 283 U.S. 102, 120 (1931).

9. In upholding the Commission's legal conclusion that in a fair and honorable dealings case based solely on moral grounds with respect to a continuing future interest in minerals and royalties reserved to the Seminole Nation under the 1898 Agreement with the United States damages are confined to strict legal rules applicable to land "taking" cases?

In conflict with:

Seminole Nation v. United States, 203 Ct. Cl. 637, –, fn. 11, 492 F.2d 811, 817, fn. 11 (1974).

10. In upholding the Commission's dismissal of this case in 1972 for petitioner's alleged failure to prove damages as of June 30, 1908, under Section 11 of the 1908 Act, thereby changing the rule of proof of damages without giving petitioner an opportunity to prove such damages, and thereby denying petitioner due process of law, since the Commission's Order of June 24, 1966, was the law of the case at the time of the trial on damages on March 10, 1969, until the 1972 dismissal?

In conflict with:

Angle v. Chicago, St. Paul, Minneapolis and Omaha Ry. Co., 151 U.S. 1, 19 (1894); *Garfield v. United States, ex. rel. Goldsby*, 211 U.S. 249, 262 (1908); *Gearinger v. United States*, 188 Ct. Cl. 512, 517, 412 F.2d 862, 865 (1969); 1 B Moore, *Federal Practice*, par. 0.404(1), pp. 402, 405, 406; par. 0.404(4), pp. 451-452.

11. In failing to hold that the Order of the Indian Claims Commission of June 24, 1966 (App. pp. 81a-82a), which directed that "the instant suit proceed on the single issue of proof of actual damages suffered by the Seminole Nation itself, as a direct consequence of the wrongful act of the defendant," was in accord with the federal rule on damages on cancellation of mineral and royalty rights?

In conflict with:

Federal Land Bank of Houston v. United States, 144 Ct. Cl. 173, 178, 179, 168 F. Supp. 788, 791, 792 (1958); *Empire Oil and Refining Co. v. Hoyt*, 112 F.2d 356, 361 (1940); *Bloch v. Sun Oil Corp.*, 335 F. Supp. 190-193 (1971).

STATEMENT OF FACTS

By a suit timely filed before the Indian Claims Commission under the broad jurisdictional provisions of Section 2 (and particularly Clause 5) of the Indian Claims Commission Act of August 13, 1946, c. 959, 60 Stat. 1049, 1050 (25 U.S.C. 70a), the Seminole Nation of Oklahoma asserted a claim against the United States, its guardian, for the actual loss it suffered as the result of the wrongful action of the United States in secretly and unilaterally altering

the Seminole Agreement of December 16, 1897, between the United States and the Seminole Nation, ratified by Act of July 1, 1898, c. 542, 30 Stat. 567. The United States secured the passage of Section 11 of the Act of May 27, 1908, c. 199, 35 Stat. 312, 316, without the knowledge and consent of the Seminole Nation which destroyed the tribe's right to one-half of the minerals and royalties produced from the Seminole tribal domain in Indian Territory, now Oklahoma, expressly reserved to the tribe in said Agreement.

The Seminole Nation is one of the Five Civilized Tribes, whose ancestral homes were east of the Mississippi River, which the United States forced them to give up and remove to lands west of the Mississippi River in what was then Indian Territory, now a part of the State of Oklahoma.

In treaties between the United States and the Five Civilized Tribes, these tribes were given the right of self-government within their western domains; and the United States agreed that no portion of their respective domains "shall ever be embraced or included within, or annexed to, any Territory or State, nor shall *** ever be erected into a Territory without the full and free consent of the legislative authority of the tribe owning the same." (Arts. 4 & 15, Creek and Seminole Treaty of August 7, 1856, 11 Stat. 699, 2 Kapp. 756, 758-761), reaffirmed by Art. 9, Seminole Treaty of March 21, 1866, 14 Stat. 755, 2 Kapp. 910, 914-915).

By 1882 the Seminole Nation owned in fee simple approximately 365,000 acres in Indian Territory (App. p. 2a), which constituted its national domain. See *Choctaw Nation, et al. v. Oklahoma, et al.*, 397 U.S. 620, 627, 638, 639, reh. den., 398 U.S. 945 (1970).

In 1893 Congress changed its policy toward the Five Civilized Tribes. By Section 16 of the Act of March 3, 1893, c. 209, 27 Stat. 612, 645, Congress created the Dawes Commission to negotiate agreements with these tribes for the allotment and division of their tribal lands among the tribal members "to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said India [sic] Territory." (App. p. 2a).

These tribes were reluctant to acceed to the new policy of Congress, which would cause so drastic a change in their accustomed way of life and property rights. The Seminole Nation, being a nation composed essentially of full blood Indians, vigorously resisted this change.[2] *Seminole Nation v. United States,* 78 Ct. Cl. 455, 472 (1933); *Seminole Nation v. United States,* 102 Ct. Cl. 565, 610, 628-629 (1944), cert. den., 326 U.S. 719, 720 (1945).

The Dawes Commission met with the General Council of the Seminole Nation on April 6, 1894 at Wewoka, in the Seminole Nation, and addressed the Council and a large number of citizens of the tribe. Thereafter the Council met and adopted resolutions declining to take any action whatever with a view of negotiating with the Dawes

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[2] In *Seminole Nation v. United States,* 102 Ct. Cl. 565, 629, *supra,* the Court of Claims stated:

> "***The Indians did not want individual allotments; they were accustomed to and preferred tribal ownership. The Indians wanted their own tribal governments; this had been guaranteed to them in the Treaty of 1856; they did not want the government of the white man. The Indians did not want to be incorporated into a State of the Union; it had been expressly promised them that they would not be. The defendant wanted all these things. The Indians acquired as a result of the agreement no land or money or other things of advantage to which they were not already entitled."

Commission. However, on July 26, 1894, the Dawes Commission submitted to the Seminole Nation certain proposals as a basis upon which negotiations could be begun "to be modified as may be deemed wise by both parties after discussion and conference." The pertinent provision thus submitted was:

> "First. *To divide all lands now owned by the Seminole Nation,* not including town sites, among all citizens according to the treaties now in force, *reserving town sites, coal and minerals, for sale under special agreement.* Sufficient land for a good home for each citizen to be inalienable for twenty-five years, or such longer period as may be agreed upon. (Italics ours). (App. pp. 106a-107a).

Oil had been discovered in Oklahoma in commercial quantities in the Osage Nation in what is now Osage County, Oklahoma, in 1897; and in the Cherokee Nation, in what is now Washington County, Oklahoma, in 1897. Oil was also discovered in the Creek Nation, in what is now McIntosh County, Oklahoma, in 1889, and in what is now Muskogee County, Oklahoma, in 1894. It was known that the same geologic structure favorable to oil and gas development existed within the Seminole domain, just south of the Osage, Cherokee and Creek domains. (App. p. 105a). Hence, the proposition relative to the disposition of the minerals which the Dawes Commission had submitted to the Seminole Nation as a basis for negotiations.

After some four years of negotiations the Seminole Nation executed an agreement with the Dawes Commission on December 16, 1897, ratified by Act of July 1, 1898, c. 542, 30 Stat. 567 (App. p. 84a(ff)). As finally negotiated the Agreement generally provided for the division of the

Seminole tribal lands to members of the tribe "so that each shall have an equal share thereof in value"; "and each allottee shall have the sole right of occupancy of the land so allotted to him during the existence of the present tribal government"; allotments were to be made under the direction and supervision of the Commission to the Five Civilized Tribes, in connection with a representative appointed by the tribal government; that "all contracts for sale, disposition, or encumbrance of any part of any allotment made prior to date of patent shall be void"; that allottees may lease their allotments for any period not exceeding six years, to be effective upon approval by the principal chief; the townsite of Wewoka to be disposed of under an Act of the General Council of the Seminole Nation approved April 23, 1897.

The other pertinent provisions relative to the present issues were:

> "No lease of any coal, mineral, coal oil, or natural gas within said Nation shall be valid unless made with the tribal government, by and with the consent of the allottee and approved by the Secretary of the Interior.
>
> "Should there be discovered on any allotment any coal, mineral, coal oil, or natural gas, and the same should be operated so as to produce royalty, one-half of such royalty shall be paid to such allottee and the remaining half into the tribal treasury until extinguishment of tribal government, and the latter shall be used for the purpose of equalizing the value of allotments; and if the same be insufficient therefor, any other funds belonging to the tribe, upon extinguishment of tribal government, may be used for such purpose, so that each allotment may be made equal in value as aforesaid.

* * *

"When the tribal government shall cease to exist the principal chief last elected by said tribe shall execute, under his hand and the seal of the Nation, and deliver to each allottee a deed conveying to him all the right, title, and interest of the said Nation and the members thereof in and to the lands so allotted to him, and the Secretary of the Interior shall approve such deed, and the same shall thereupon operate as relinquishment of the right, title, and interest of the United States in and to the land embraced in said conveyance, and as a guarantee by the United States of the title of said lands to the allottee; and the acceptance of such deed by the allottee shall be a relinquishment of his title to and interest in all other lands belonging to the tribe, except such as may have been excepted from allotment and held in common for other purposes. Each allottee shall designate one tract of forty acres, which shall, by the terms of the deed, be made inalienable and nontaxable as a homestead in perpetuity.

"All moneys belonging to the Seminoles remaining after equalizing the value of allotments as herein provided and reserving said sum of five hundred thousand dollars for school fund shall be paid per capita to the members of said tribe in three equal installments, the first to be made as soon as convenient after allotment and extinguishment of tribal government, and the others at one and two years, respectively. Such payments shall be made by a person appointed

by the Secretary of the Interior, who shall prescribe the amount of and approve the bond to be given by such person; and strict account shall be given to the Secretary of the Interior for such disbursements.

* * *

"This agreement shall in no wise affect the provisions of existing treaties between the Seminole Nation and the United States, except in so far as it is inconsistent therewith.

* * *

"When this agreement is ratified by the Seminole Nation and the United States, the same shall serve to repeal all the provisions of the Act of Congress approved June seventh, eighteen hundred and ninety-seven, in any manner affecting the proceedings of the general council of the Seminole Nation."

* * *

"This agreement shall be binding on the United States when ratified by Congress and on the Seminole people when ratified by the general council of the Seminole Nation." (App. pp. 86a-90a).

The above provisions of the Seminole Agreement show that the tribal assets were to continue to be vested in the Seminole Nation "until extinguishment of tribal government." So long as the tribal government continued in existence the mineral leases were to be made with the tribal government, and one-half of the royalties on all minerals as and when produced from Seminole allotted lands were to be paid into the Seminole tribal treasury. Thus these royalties were to become a part of the tribal

communal fund to be used by the tribe, with other tribal funds, for equalization of the value of the allotments, and were to be paid to the individual members upon "extinguishment of tribal government." Deeds were not to issue to Seminole allottees until extinguishment of tribal government. The Agreement left open and did not set the time when the tribal government was to be extinguished.

The United States took over full administrative control of the property and assets of the Seminole Nation under the 1898 Seminole Agreement (*Cherokee Nation v. Hitchcock*, 187 U.S. 294, 306-307 (1902); *Chickasaw Nation v. United States*, 7 Ind. Cl. Comm. 64, 77-78, 88-91 (1959); *Seminole Nation v. United States*, 27 Ind. Cl. Comm. 141, 149-150 (1972), rev. on other grds., 203 Ct. Cl. 637, 492 F.2d 811 (1974)). The United States, as such guardian, was in duty bound to preserve, protect and manage the Seminole tribal property rights, and faithfully to carry out the provisions of the Seminole Agreement (*United States v. Creek Nation*, 295 U.S. 103, 109, 110, reh. den., 295 U.S. 769 (1935)).

No sooner than the Agreement had been ratified, the United States began unilaterally to alter its provisions, without the knowledge and consent of the Seminole Nation, thereby setting the stage for all sorts of exploitation that followed. (App. pp. 34a, 94a-96a). Respondent passed Section 8 of the Indian Appropriations Act of March 3, 1903, c. 994, 32 Stat. 982, 1008, which provided:

> "That the tribal government of the Seminole Nation shall not continue longer than March fourth, nineteen hundred and six: *** *Provided further*, That the homestead referred to in said Act [1898 Seminole Agreement] shall be inalienable during the lifetime of the allottee,

> not exceeding twenty-one years from the date of the deed for the allotment.***" (insert supplied).

The United States next changed the provisions of the 1898 Seminole Agreement in Section 1 of the Indian Appropriation Act of April 21, 1904, c. 1402, 33 Stat. 189, 204-205, by removing all restrictions against alienation of allottees who were not of Indian blood, except minors and homesteads.

This Act became the means by which many uneducated and unenlightened Freedmen of the Seminole Nation, and Freedmen of the other Five Civilized Tribes, were cheated out of their valuable allotted lands. The record shows that by 1908, 1357 tracts had thus been lost by Seminole allottees. (App. p. 96a).

The United States realized that the Act of March 3, 1903, *supra*, was not in the best interest of the Indians, and eliminated March 4, 1906, the date as of which the tribal governments were to go out of existence. The Joint Resolution of March 2, 1906, P.R. 7, 34 Stat. 822, provided that:

> "***the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole Tribes or Nations of Indians in the Indian Territory are hereby continued in full force and effect for all purposes under existing laws until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members of said tribes unless hereafter otherwise provided by law."

And Section 28 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, 148, thereafter provided in part:

> "That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole Tribes or Nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law,***".

Section 6 of said Act of April 26, 1906, 34 Stat. 139, passed without the consent of the Seminole Nation further, unilaterally altered the Seminole Agreement by providing:

> "*Provided,* that the principal chief of the Seminole Nation is hereby authorized to execute the deeds to allottees in the Seminole Nation prior to the time when the Seminole government shall cease to exist."

This provision was not mandatory on the principal chief to issue deeds before the Seminole tribal government ceased to exist.

However, any deeds thus authorized to be executed would be charged with the express reservation of the Seminole Nation of one-half of the royalties on all minerals produced from Seminole allotted lands, even though not written in said deeds, this reservation in the 1898 Seminole Agreement not having been repealed by the above Section 6. *Swendig, et al. v. Washington Water Power Co.*, 265 U.S. 322, 332 (1924); *United States v. State of Washington*, 233 F.2d 811, 817 (1956); *United States v. Bruisehead, et al.*, 248 F. Supp. 999, 1001 (1966).

The United States, as guardian, *supra*, p. 16, was required to protect the Seminole Nation in the tribal mineral rights reserved under the Seminole Agreement, by making, if necessary, an express reservation of such reserved right in the deeds to allottees authorized to be issued under said

Section 6. *United States v. Creek Nation,* 295 U.S. 103, 109, 110, reh. den., 295 U.S. 769 (1935); *Seminole Nation v. United States,* 316 U.S. 286, 296, 297 (1942).

The Enabling Act of June 16, 1906, c. 3335, 34 Stat. 267, 270, 271, providing for the admission of the State of Oklahoma into the Union was "conditioned on its disclaimer of all right and title to lands 'owned or held by any Indian, tribe or nation' ***." *Choctaw Nation, et al. v. Oklahoma, et al.,* 397 U.S. 620, 627, reh. den., 398 U.S. 945 (1970).

The following facts which the Indian Claims Commission found in its 1966 findings as the "gravamen of this case" under the independent fair and honorable dealings jurisdiction of the Indian Claims Commission Act, were completely omitted from the 1972 findings of the Commission, even though the same record was before the Commission in 1966 and in 1972. Despite the fact that the Indian Claims Commission, in its 1972 opinion, agreed with the 1966 finding that the Commissioner of Indian Affairs surreptitiously secured the passage of Section 11 of the 1908 Act, and considered his acts an impropriety, *infra,* p. 37, the Court of Claims failed to remand the 1972 findings of the Commission with directions to find the omitted facts which are reflected in the substantial evidence in the record of this case. These omitted facts are set forth below:

1. When H.R. 15641, which became the Act of May 27, 1908, c. 199, 35 Stat. 312, 316, was introduced into the United States House of Representatives in the first session of the 60th Congress, it had for its sole purpose the "removal of restrictions from land allotments of the Five Civilized Tribes." The bill was initiated and sponsored by the Department of the Interior. (App. pp. 68a-69a, 96a).

2. During the hearings on this bill before the House Committee on Indian Affairs representatives of the Five Civilized Tribes appeared and opposed this bill on the ground that it would be used by unscrupulous white men and speculators as a means of securing from the unenlightened and uninformed Indians of the Five Civilized Tribes their valuable allotted lands without the payment of any adequate compensation, in the same manner as was done after the passage of the prior Act of April 21, 1904. (App. pp. 67a, 94a-95a).

3. In fact, as early as 1907, the Report of the Secretary of the Interior on the affairs of the Five Civilized Tribes in Indian Territory, reviewed the effect of the removal of restrictions on Indian lands, stating in part (App. pp. 93a-94a):

> "***The experience since the opening of this territory to white settlement shows most clearly that it is not safe to remove all restrictions. The dealings of the white man in the Indian Territory, in the acquisition of the valuable agricultural and oil lands, have shown too many instances of unconscionable greed and dishonesty. The agricultural lands in the Indian Territory are wonderfully fertile, having increased many-fold in value during the past ten years. But, in addition to this, the discovery of the deposits of oil and coal has made certain sections of that country very much more valuable and has tremendously increased the desire of white men to obtain control of those sections. Thus far, these oil and coal lands have been handled under a system of leasing controlled by the Interior Department."

Nevertheless, the Interior Department initiated and sponsored H.R. 15641 to remove restrictions on the alienation of more of these lands. (App. p. 96a).

4. As H.R. 15641 passed the House with amendments, it contained nothing pertaining to mineral leases of allotted Seminole lands, or the reservation to the Seminole Nation of its one-half interest in the minerals and royalties produced from Seminole allotted lands contained in the 1898 Seminole Agreement. (App. p. 53a).

5. The Senate Committee on Indian Affairs reported out H.R. 15641 with numerous recommended amendments, including the addition of recommended new sections numbered 10, 11, and 12 (Senate Amendment Nos. 36, 37 and 38, respectively). Amendment No. 38 contained the following language (App. pp. 53a-54a):

> "The next amendment was, on page 10, after line 16, to insert as a new section the following:
>
> "Sec. 12***
>
> "And all royalties heretofore accrued or hereafter arising from mineral leases by Seminole allottees heretofore or hereafter made shall be paid to the United States Indian Agent, Union Agency, for the benefit of the Indian lessor or his proper representative to whom such royalties shall hereafter belong; and all royalties accrued or hereafter accruing under any oil lease made under Section 13 of the Act of Congress approved January 28, 1898, entitled "An act for the protection of the people of Indian Territory, and for other purposes," shall be paid to allottees of the land included

> in such lease pro rata according to the respective holdings, or to their lawful assigns."[3]

The Senate Committee on Indian Affairs did not recommend, or mention, anything in the nature of the proviso now being traced. The bill was reported to the Senate as amended, and the amendments were concurred in including the above Amendment No. 38 (App. p. 54a).

6. Since the House and Senate versions of H.R. 15641 differed, conferees were appointed by both Houses to resolve the differences. When the conferees of the House of Representatives reported back that the differences had been resolved "*** after full and free conference***," it was said that the Senate receded from its Amendment 36 which proposed to add a new section numbered 10. This concession on the part of the Senate had the effect of utterly eliminating the proposed Section 10 from the bill, H.R. 15641. (App. p. 54a).

The House conferees also reported back that the House receded from its disagreement to the amendment of the Senate numbered 38, but with an amendment to strike the proposed Section 12 in its entirety and substitute the following (App. pp. 54a-55a):

> "Sec. 12. That all royalties arising on and after July 1st, nineteen hundred and eight, from mineral leases of allotted Seminole lands heretofore or hereafter made, which are subject to the supervision of the Secretary of the Interior, shall be paid to the United States Indian Agent, Union

[3] Section 13 of the Curtis Act of June 28, 1898, c. 517, 30 Stat. 495, did not apply to the Seminole Nation. *Seminole Nation v. United States*, 27 Ind. Cl. Comm. 141, 149 (1972), rev. on other grounds, 203 Ct. Cl. 637, 492 F.2d 811 (1974).

> Agency, for the benefit of the Indian lessor or his proper representative to whom such royalties shall thereafter belong; and no such lease shall be made after said date except with the allottee or owner of the land: *Provided,* That the interest of the Seminole Nation in leases or royalties arising thereunder on all allotted lands shall cease on June thirtieth, Nineteen Hundred and Eight."

The explanation tendered to the House of Representatives anent Senate Amendment No. 38 was (App. p. 55a):

> "***The main changes are as follows: Another provision provides for the disposal of the moneys arising from the rental of mineral lands in the Seminole Indian Reservation for the benefit of the Seminole Indians . . ."

While the explanation tendered to the Senate was (App. p. 55a):

> "Amendment No. 38 provides for the disposal of the moneys received as royalties under mineral leases of the lands in the Seminole Nation."

Neither House was informed of the effect of the proviso upon the Seminole Nation's fund-of-one-half-of-the-royalties. No minutes of the House-Senate conference being available, it is not possible to identify the Representative or Senator who advanced the termination proviso, or to determine the motive behind it. (App. p. 55a).

7. The bill was passed without material discussion and without any debate whatsoever on the proviso, no Congressman claiming credit for it. (App. p. 56a).

In his 1908 report to the Secretary of Interior, the Commissioner of Indian Affairs claimed the credit, saying (App. p. 56a):

> "The agreement with the Seminole Nation, ratified by Congress on July 1, 1898. . . . provided that of all royalties produced from allotted lands in that tribe, one-half shall be paid to the allottee and the remaining half into the tribal treasury until the extinguishment of the tribal government. This differed from the rule in force in the other four nations [Creeks, Cherokees, Choctaws, and Chickasaws], where allottees received all the royalties. So on the department's recommendation the following clause was inserted in the 'restrictions' act:
>
> Sec. 11. That all royalties arising on and after July 1, 1908, from mineral leases of allotted Seminole lands heretofore or hereafter made, which are subject to the supervision of the Secretary of the Interior, shall be paid to the United States Indian Agent, Union Agency, for the benefit of the Indian lessor or his proper representative to whom such royalties shall thereafter belong; ***"

8. Thus the Indian Claims Commission in 1966, found that the Commissioner of Indian Affairs advanced the entire Section 11 with proviso, and the Secretary of the Interior signed the letter and memorandum of May 16, 1908, recommending the proviso with an explanation that could only be characterized as specious. In fact, the Commissioner of Indian Affairs did not advance the entire Section 11 as a whole before the Senate Committee on Indian Affairs, but offered the proviso separately and surreptitiously to the Conference Committee, a stage in the

proceedings where no minutes were being maintained and where consequent debate was unlikely.[4] And finally, the section and proviso were offered as a mere correction of a minor inconsistency and not as a major and far-reaching unilateral change in an existing agreement of treaty stature. (App. pp. 56a-57a).

Section 11 of the Act of May 27, 1908, c. 199, 35 Stat. 312, 316, as finally enacted, was identical in language with Section 12 of the Conference Report, quoted above, *supra*, pp. 22-23.

Thus, in passing this section, the United States unilaterally and materially altered its Agreement with the Seminole Nation so as to destroy completely the valuable property rights of said Nation to one-half of the minerals and royaltics produced from Seminole allotted lands, which were expressly reserved to the Seminole Nation in said 1898 Agreement; this action of the United States being taken without the knowledge and consent of the Seminole Nation and without giving it an opportunity to be heard and to object to this action of the United States.

The record shows that as the result of this wrongful action by the United States "over 90 percent of them [Seminoles] have, by this action, been deprived of any participation in the value of the royalties arising to which they were entitled." (App. p. 102a). The record further shows that the other 10 percent of the Seminole allottees were largely defrauded of their valuable allotments through the removal of restrictions acts passed by Congress, with the full knowledge of respondent that these acts would be used as a means by which these unenlightened and

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[4] The 1972 decision of the Commission was in agreement, *infra*, p. 37.

uneducated full-blood Seminole Indians would be deprived of their lands. *Supra*, p. 20.

Even as late as 1912, when the deeds to Seminole allottees began to be issued, gross frauds were being practiced on these helpless and uneducated full-blood Indians. In 1912, the Commissioner of Indian Affairs reported to the Secretary of the Interior that Seminole allottees were losing their lands for grossly inadequate considerations; that about 800 deeds to restricted allottees were held in his office under instructions of the Department for investigation as to many alleged illegal conveyances affecting the lands described therein; and that 751 deeds to unrestricted allottees, who, it is claimed, sold their lands for grossly inadequate considerations, were in the hands of the Special Assistant to the Attorney General, at Wewoka, Oklahoma, in charge of suits affecting rights and titles to lands in the Seminole Nation. (App. pp. 99a-100a).

The very purpose of the Seminole Nation to save to the tribe at least one-half of the minerals and royalties from all minerals produced from Seminole lands was wholly thwarted by the unilateral action of the United States in their secretly initiating, sponsoring and securing the passage of Section 11 of the 1908 Act, completely destroying this tribal right reserved in the 1898 Agreement.

The 1966 findings of the Commission determining respondent's liability concluded:

> "10. This Commission concludes that the Commissioner of Indian Affairs must bear the onus for the sequence of events set out above and in the concurrent Opinion this day issued, and that the defendant is ultimately responsible for the actions of its servant, the Commissioner

of Indian Affairs. The acts of the Commissioner of Indian Affairs which underly the liability include the sequential offering the Section 11 and its proviso upon occasions when the Seminole Nation would be least able to counteract the offer; failure to afford the Seminole Nation any opportunity to be heard on the subject; and misrepresentation of the measure as a mere correction of a minor inconsistency. These acts were inconsistent with the concept of fair and honorable dealings contemplated by Clause 5 of Section 2 of the Indian Claims Commission Act of 1946." (App. p. 57a).

The Interlocutory Order of the Commission, dated June 24, 1966, insofar as pertinent herein stated (App. pp. 81a-82a):

"Upon the Findings of Fact numbered 1 through 10 and the Opinion this day entered, this Commission concludes as a matter of law:

* * *

"3. The Commissioner of Indian Affairs actionably wronged the plaintiff in the process of securing legislation which terminated the Seminole Nation's equalization fund, which legislation is known as the proviso to Section 11 of the Act of May 27, 1908 (35 Stat. 312, 316).

"4. The defendant, by reason of the wrongful act of its representative, the Commissioner of Indian Affairs, is liable for actual damages suffered by the plaintiff resulting from the termination of the equalization fund, which wrongful action was inconsistent with the

concept of fair and honorable dealings contained in Clause 5 of Section 2 of the Indian Claims Commission Act of 1946 (25 U.S.C. 70a).

"IT IS THEREFORE ORDERED AND ADJUDGED that the instant suit proceed on the single issue of proof of actual damages suffered by the Seminole Nation itself, as a direct consequence of the wrongful act of the defendant."

Counsel for the United States made no objection to the June 24, 1966 findings and opinion of the Commission, and did not take an interlocutory appeal from the above order.

Thereafter, counsel for the petitioner proceeded to comply with the directive of the Commission, which established the law of the case on damages, hired an expert geologist and engineer, and prepared for trial on the proof of actual damages suffered by the Seminole Nation itself, as a direct consequence of the wrongful act of the United States.

On March 10, 1969, trial on the issue of damages was held before the Commission, and petitioner presented evidence of the actual damages suffered by it as the result of the respondent's wrongful action – the value of one-half of the usual one-eighth royalty on all oil and gas produced from Seminole allotted lands to date. Counsel for respondent submitted no evidence on value, and after almost three years from the Commission's Interlocutory Order of June 24, 1966, for the first time raised the issue of whether damages should be valued as of June 30, 1908, the date when Section 11 of the Act of May 27, 1908, terminated the mineral and royalty rights of the Seminole Nation. (App. pp. 7a-8a, 83a).

Thereafter, on March 20, 1969, petitioner filed its requested findings of fact and brief on value. Instead of filing its brief on April 28, 1969, respondent filed its formal motion to dismiss for failure of petitioner to prove damages as of June 30, 1908. On May 2, 1969, petitioner, plaintiff below, filed its objection to respondent's motion. On August 18, 1969, the Commission issued an order setting respondent's motion down for oral argument on September 17, 1969. (App. p. 83a).

On July 7, 1971, almost 2 years after the oral argument on this motion, the Commission by a majority of 4 to 1 overruled respondent's motion, and ordered respondent to file its request for findings of fact, objections to petitioner's requested findings of fact, and brief on the issue of damages 40 days from the date of this order. (App. p. 83a). On January 12, 1972, respondent filed its brief, requested findings of fact and objections to petitioner's proposed findings of fact on value. On January 26, 1972, petitioner's reply brief on value was filed with the Commission. (App. p. 20a).

On May 31, 1972, instead of following the law of the case on damages under the Commission's Order of June 24, 1966, the Commission reversed its 1966 holding and interlocutory order that had stood unchallenged for almost 6 years, and dismissed the petition. Commissioner Blue wrote a dissenting opinion which was joined in by Commissioner Vance. (App. pp. 18a-36a, 45a-46a). Commissioner Blue stated (App. pp. 35a-36a):

> "In entering into the 1898 Agreement, the Seminole Nation was acting for itself and its members, with a certain clear intent, for its members to retain the land and receive equal value, through the equalization fund. The fact

is, the Seminole Nation did not cede its land in the 1898 Agreement. The 1908 Act and other acts following the 1898 Agreement unilaterally took away the vested rights of the Seminole Nation and its members. Every form of government is damaged if its people are damaged and to the extent they are damaged. This is uniquely true when the damage results from violating an agreement entered into with that government, under which agreement certain acts were taken because of the provisions that certain other actions would be maintained.

"The majority relies to some extent on the two Court cases: *Fish v. Wise*, 52 F.2d 544 (10th Cir. 1931), *cert. denied*, 284 U.S. 688 (1932), and *Moore v. Carter Oil Co.*, 43 F.2d 322 (10th Cir. 1930), *cert. denied*, 282 U.S. 903 (1931).

"I don't think either of the above cases is applicable in the case before this Commission. Both cases were decided prior to the establishment of the Indian Claims Commission.

"The 1966 Commission's opinion followed an extensive inquiry; it was well reasoned and just. I do not think it should be vacated or set aside. We should proceed to consider the extent of the actual damages, if any, the Seminole Nation suffered."

The Indian Claims Commission Act authorized petitioner for the first time to present this claim under the broad moral principles of fair and honorable dealings of Section 2, Clause 5, of the Indian Claims Commission Act.

On January 26, 1973, the Commission denied petitioner's motion for rehearing, which had been filed on June 28, 1972, Commissioners Blue and Vance dissenting. (App. pp. 47a-48a).

On April 9, 1973, petitioner filed its notice of appeal to the Court of Claims from the errors the majority of the Commission had made in its May 31, 1972 findings and opinion. On June 19, 1974, the Court of Claims affirmed the May 31, 1972 findings and opinion of the Commission (App. pp. 1a-17a), this compounding the errors made by the Commission.

To resolve the many conflicts between the decisions of this Court, the decisions of the Circuit Courts of Appeal, and the prior decisions of the Court of Claims, advanced herein, petitioner has submitted this petition for a writ of certiorari.

The issues herein presented have never been directly passed upon by this Court, and involve important issues of national interest necessary to the proper administration of justice in defining the jurisdiction of the Indian Claims Commission under the provisions of Section 2, Clause 5 of the Indian Claims Commission Act of 1946, which authorized the Commission for the first time to determine as a independent cause of action:

> "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity."

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The decision of the Court of Claims conflicts with decisions of this Court, and other Federal Courts, and prior decisions of the Court of Claims in the following respects:

NATURE OF SEMINOLE NATION'S INTEREST PRIOR TO JUNE 30, 1908, IN MINERALS AND ROYALTIES UNDER THE 1898 AGREEMENT WITH THE UNITED STATES.

In upholding the Commission, the Court of Claims stated:

> "***The 1898 Agreement established only an 'equalization fund' to provide a means by which allotments made to individual Indians could be equalized as to value. As such, the Seminole Nation served only as a temporary stakeholder with respect to the interests of its member-allottees.***
>
> * * *
>
> "In effect the agreement established an express trust with the tribal government as trustee and the individual allottees as beneficiaries. No rights vested in the tribal government, only duties. Appellant, in its own right, had no independent property interest redressable in this court.***" (App. pp. 13a, 15a).

CONFLICTS UNDER QUESTION 1.

With respect to the express trust theory this holding is in conflict with the decision of this Court in *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 306, 307 (1902), involving oil leases made by that tribe. The Court stated:

> "***The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right is so vested as to preclude inquiry into his status involves a contradiction in terms.***
>
> "Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members."

In *Ligon, et al. v. Johnston, et al.*, 164 F. 670, 672 (1908), cert. den., 223 U.S. 741 (1911), the Circuit Court said:

> "***True, as contended, the title so held has frequently been referred to as being held in trust for the members of the tribes, but it is so only in the broad comprehensive sense in which the public property of any representative government is in trust for the welfare of its people. Until specific private individual rights attach pursuant to law, the enforcement of such rights must be at the bar of public conscience.***"

Thus, the *Cherokee* and *Ligon* cases hold that moneys in the tribal treasury are public trusts belonging solely to the tribe. The Court of Claims decision herein to the effect that such moneys constituted an "express trust" in which only the individual Seminoles, and not the Nation, had an interest, is in direct conflict with these decisions.

With respect to the tribal or communal property aspect, versus the individual interest, the above holding of the Court of Claims is in conflict with:

United States v. Jim, et al., 409 U.S. 80, 82 (1972), reh. den., 409 U.S. 1118 (1973); *In re Dennison*, 38 F.2d 662, 664 (1930), app. dis., 45 F.2d 585 (1931); *Taylor v. Tayrien, et al.*, 51 F.2d 884, 887, cert. den., 284 U.S. 672 (1931).

In the *Jim* case, this Court held:

> "The judgment of the District Court is in error. Congress in 1933 did not create constitutionally protected property rights in the appellees (individual tribal members). The Aneth Extension was added to a tribal reservation, and the leases which give rise to mineral royalties are tribal leases. It is settled that '(w)hatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members.'*** To be sure, the 1933 Act established a pattern of distribution which benefited the appellees more than other Indians on the Navajo Reservation."*** (parenthetical phrase is ours).

In the *Taylor* case the Circuit Court held:

> "The 1906 Act made no allotment of the mineral estate in the land; it remained tribal property. The individual Indian had only an inchoate right to receive his share of the net returns therefrom, subject to the will of Congress. It is entirely clear that under the 1906 Act no Indian had any right to dispose of any mineral interest."

See also *In re Dennison* cited above.[5]

The Court of Claims decision held that the direct obligation and right were those of the individual Seminole, and not of the Nation; whereas, the *Jim, Taylor* and *Dennison* cases held that the obligation and rights in minerals and royalties were tribal and not individual.

CONFLICTS UNDER QUESTION 2.

Section 6 of the Act of April 26, 1906, 34 Stat. 137, 139, provided that the principal chief had authority to execute deeds to allottees prior to the time when the Seminole government ceased to exist. It did not direct him to do so, and he could, if he thought best, withhold such deeds until the tribal government went out of existence. Section 28 of this Act, 34 Stat. 137, 148, continued the tribal existence and the present tribal government in full force and effect for all purposes provided by law, until otherwise provided by law.

In the light of these facts the Court of Claims failed to hold that the 1906 Act continued the Seminole Nation's

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[5] The *Taylor* and *Dennison* cases involve minerals and royalties of the Osage Tribe in Oklahoma. Under the Act of June 28, 1906, c. 3572, 34 Stat. 539, there was a reservation of minerals and royalties to the tribe in allotted lands for 25 years, and a trust fund in the tribal account in the United States Treasury in which there were to be deposited all royalties from mineral leases on allotted lands made by the tribe; and every calendar quarter the royalties in the tribal account were to be divided equally among all the members and credited to the account of each member in the United States Treasury. At the end of the 25 years, the mineral interests and royalties were to vest in the individual Indians. This Court, in *West v. Oklahoma Tax Commission*, 334 U.S. 717, 719-722, reh. den., 335 U.S. 838 (1948), quoted with approval the *Taylor* and *Dennison* cases.

interest in mineral and royalties with respect to the allotted lands. In so failing its decision is in conflict with:

> *Gritts v. Fisher,* 224 U.S. 640, 644, 645 (1912); *Choctaw Nation, et al. v. Oklahoma, et al.,* 397 U.S. 620, 627, 638, 639, reh. den., 398 U.S. 945 (1970).

In those cases, this Court found that the property interests of the Five Civilized Tribes involved therein were continued as a result of the passage of the 1906 Act.

THE RELATION OF THE FAIR AND HONORABLE DEALINGS PROVISION, CLAUSE 5, SECTION 2 OF THE INDIAN CLAIMS COMMISSION ACT TO THIS CASE.

Clause 5 of Section 2 of the Indian Claims Commission Act provides that the United States would be liable to an Indian tribe if its dealings with that tribe were not fair and honorable, without regard to the rules of law or equity.

In this case the undisputed evidence shows that the Commissioner of Indian Affairs –

> "***did not advance the entire Section 11 as a whole before the Senate Committee of Indian Affairs, but offered the proviso separately and surreptitiously at a stage in the proceedings where no minutes were being maintained and where subsequent debate was unlikely. And finally, the section and proviso were apparently offered as a mere correction of a minor inconsistency, and not as a major and far-reaching unilateral change in an existing agreement of treaty stature." App. p. 57a).

The far reaching change was that, as of June 30, 1908, the interest of the Seminole Nation in one-half of the minerals and royalties was abolished and transferred to the individual allottees, or their assigns, on whose lands the minerals were located,[6] although the Nation has continued to exist to this very day.

The 1966 decision of the Commission held that the above acts of the Commissioner of Indians Affairs in initiating and persuading Congress to accept Section 11 of the 1908 Act were "inconsistent with the concept of fair and honorable dealings contemplated by Clause 5 of Section 2 of the Indian Claims Commission Act of 1946." (App. p. 57a).

The 1972 opinion of the Commission stated (App. p. 29a):

> "We can agree with the Commission's concern expressed in the 1966 decision with respect to the secretive aspects of a congressional enactment affecting the Seminole Nation's royalty fund without the Nation's knowledge. But any such impropriety alone cannot give rise to a cause of action under Clause 5, Section 2 of the Indian Claims Commission Act.***"

The 1972 decision of the Commission further determined that the acts of the Commissioner of Indian Affairs were merely ministerial, which had been intended by the 1898 Agreement (App. p. 29a). The Court of Claims agreed (App. p. 11a).

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[6] As a result of the 1908 Act, 90 percent of the allottees were deprived of the ultimate benefits from the distribution of mineral royalties. (App. p. 102a).

CONFLICTS UNDER QUESTION 3.

The above holdings on such impropriety alone are in direct conflict with two decisions of the Court of Claims, and this Court has never passed upon the issues hereunder. In *United States v. Kiowa, Comanche and Apache Tribes of Indians,* 143 Ct. Cl. 534, 537-541, 163 F. Supp. 603, 606-608, recon. den., 143 Ct. Cl. 545, 166 F. Supp. 939 (1958), cert. den., 359 U.S. 934 (1959), the Court of Claims upheld a Commission decision in which the United States was determined to be liable under fair and honorable dealings clause because Congress amended an agreement with those Indians without the consent of the Indians and without giving them a chance to be heard.

In the *Kiowa* case the Court referred to an earlier Kiowa Treaty of 1867, which provided that no property of the tribe could be disposed of without the consent of the tribe. In this case, similar provisions were contained in Articles 3 and 4 of the Creek-Seminole Treaty of August 7, 1856 (11 Stat. 699, 2 Kapp. 756, 758), and continued in Articles 9 and 11, Seminole Treaty of March 21, 1866 (14 Stat. 755, 2 Kapp. 910, 914, 915). Furthermore, the 1898 Seminole Agreement provided (App. p. 88a):

> "This agreement shall in no wise affect the provisions of existing treaties between the Seminole Nation and the United States, except in so far as it is inconsistent therewith."

The facts and circumstances in the *Kiowa* case are substantially the same as in this case, and the Court of Claims decision herein is in direct conflict with its own decision in the *Kiowa* case.

In the case of *Navajo Tribe of Indians v. United States,* 176 Ct. Cl. 502, 508-510, 364 F.2d 320, 322-324 (1966),

the United States was held liable for dealings not fair and honorable because they caused the cancellation of a Navajo tribal oil lease *without the knowledge and consent of the tribe.*

CONFLICTS UNDER QUESTION 4.

In this case, the United States had full administrative control over the property and affairs of the Seminole Nation and nad the duty to carry out faithfully the provisions of the 1898 Agreement as guardian of the Nation. It could not unilaterally destroy the Nation's valuable property right in minerals and royalties reserved to the tribe under the Agreement, without providing compensation therefor. Such was the holding of this Court in *United States v. Creek Nation,* 295 U.S. 103, 109-110, reh. den., 295 U.S. 769 (1935). Therefore, the decision of the Court of Claims herein is in conflict with that case, in not so holding.

Moreover, under those circumstances, the decision of the Court of Claims is in conflict with *Seminole Nation v. United States,* 316 U.S. 286, 296, 297 (1942), in that the conduct of the United States, as such guardian, should have been judged by "the highest fiduciary standards." See also *Navajo Tribe, supra,* at p. 507.

CONFLICTS UNDER QUESTION 5.

The Commission relied upon *Moore v. Carter Oil Co.,* 43 F.2d 322 (1930), cert. den., 282 U.S. 903 (1931); *Fish v. Wise,* 52 F.2d 544, 545 (1931), cert. den., 284 U.S. 688 (1932), and *Goat v. United States,* 224 U.S. 458 (1912), in its decision that prior to June 30, 1908, the Seminole Nation had no property interest in minerals

and royalties in allotted lands (App. p. 43a), and the Court of Claims agreed. (App. pp. 10a, 13a, 15a).

These cases dealt with legal or equitable claims and did not deal with moral claims under Section 2, Clause 5 of the Indian Claims Commission Act of 1946, and were decided long before that Act was passed. This Court, and the Court of Claims, have consistently held that such cases are not applicable to moral claims of the type involved herein. In *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 103 (1949), this Court stated:

> "An Indian reservation created by Executive Order of the President conveys no right of use or occupancy to the beneficiaries beyond the pleasure of the Congress or the President. Such rights may be terminated by the unilateral action of the United States without legal liability for compensation in any form even though Congress has permitted suit on the claim.[22]"

Footnote 22 then states:

> "Possible claims under the Indian Claims Commission Act of August 13, 1946, are not covered by this statement. See 60 Stat. 1049, 1050, c. 959, Sec. 2(5), 25 U.S.C. 70a, 5 FCA 25, Sec. 70a. It refers to claims 'based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.'"

See also *Creek Nation v. United States*, 168 Ct. Cl. 483, 490, ff (1964).

The Court of Claims decision is in direct conflict with these cases when it applied *Moore v. Carter Oil Co.*, and the other cases, *supra*, to a fair and honorable dealings claim such as this one. The Court of Claims herein well

recognized the conflict with Moore, etc., when it stated:

> "***Absent a determination of a violation of the 'fair and honorable dealings' clause, the applicability of Moore was in no way affected by passage of the Indian Claims Commission Act." (App. p. 14a).

CONFLICTS UNDER QUESTION 6.

The Court of Claims held:

> "***even assuming that speculation as to the motivation of Congress in enacting a statute is a permissible subject of judicial inquiry.*** Appellants have cited no cases to demonstrate that the Indian Claims Commission Act*** vitiates the established rule to the contrary.***" (App. p. 16a).

This holding conflicts with *Western Cherokee Indians, et al. v. United States*, 114 Ct. Cl. 716, 722, 723, 86 F. Supp. 981, 983, 984 (1949), dealing with the Congressional omission of a provision from a treaty promised by the President to the Indians; and *United States v. Kiowa, etc., supra*, dealing with Congressional changes in an agreement without the knowledge and consent of the Indians. In both cases the Court permitted judicial inquiry to show whether the dealings of the United States to secure the passage of legislation were not fair and honorable.

Furthermore, this holding of the Court of Claims denied its right to adjudicate this political issue which Congress had made justiciable under Section 2, Clause 5 of the Indian Claims Commission Act.

In *Assiniboine Tribe v. United States,* 128 Ct. Cl. 617, 631, 121 F. Supp. 906, 915, cert. den., 348 U.S. 863 (1954), and *Creek Nation v. United States, supra,* at pages 493-496, all political issues were recognized as justifiable under said Clause 5. Therefore, the holding of the Court in this case conflicts with *Assiniboine* and *Creek.*

THE COURT OF CLAIMS SHOULD HAVE REVERSED THE JUDGMENT OF THE COMMISSION BECAUSE IT DID NOT MAKE PERTINENT FINDINGS OF FACT BASED UPON SUBSTANTIAL EVIDENCE AND BECAUSE IT DID NOT HAVE SUBSTANTIAL EVIDENCE OR ANY EVIDENTIARY FINDINGS TO SUPPORT THE PRINCIPAL CONCLUSION IN ITS OPINION.

CONFLICTS UNDER QUESTION 7.

Despite the undisputed evidence of record, *supra,* pp. 19-25, that the Commissioner of Indian Affairs surreptitiously obtained the passage of Section 11 of the 1908 Act,[7] the Commission in its 1972 decision failed to make any finding thereon. The Court of Claims did not reverse the Commission for such failure, and the Court's decision is, therefore, in conflict with decisions of this Court and other decisions of the Court of Claims.

In *Seminole Nation v. United States,* 316 U.S. 286, *supra,* at page 300, this Court said:

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[7] In its 1972 opinion the Commission agreed with the 1966 finding in this respect, *supra,* p. 37.

> "***When the Court of Claims fails to make findings on a material issue it is proper to remand the case for such findings.*** Accordingly, this phase of the case must be remanded so that the Court of Claims can consider such relevant evidence and other data as may be brought to its attention, make the necessary findings of fact, and thus determine whether this case fits into the rule which we have enunciated."

See also *Miami Tribe v. United States*, 146 Ct. Cl. 421, 469, 175 F. Supp. 926, 954 (1959).

In this case the evidence of the acts of the respondent's Commissioner of Indian Affairs were pertinent and material to the issue of fair and honorable dealings.

CONFLICTS UNDER QUESTION 8.

In this case, the Indian Claims Commission, without any findings of fact in support thereof, stated in its *opinion:*

> "The Commissioner was in no manner involved in improper conduct, and, we are convinced, he was merely acting in a ministerial capacity to provide the means for accomplishing that which had always been intended by the 1898 Seminole Agreement. Section 11 was added to the 1908 Act for the purpose of clarifying the payment of royalties.***" (App. p. 29a).

There is no substantial evidence in the record to support a finding of fact even if such conclusion in the opinion of the Commission had been made the subject of a finding.

Despite this situation, the Court of Claims agreed with the Commission. (App. pp. 15a, 16a). The Court's decision is, therefore, in conflict with decisions of this Court. In *Saltonstall v. Birtwell,* 150 U.S. 417, 419 (1893), this Court held:

> "We are of opinion that the facts set forth in the special findings are not sufficient to support the judgment.*** The opinion might help the findings, but cannot be resorted to for that purpose.***"

See also *United States v. Wells,* 283 U.S. 102, 120 (1931).

THE DECISION OF THE COURT OF CLAIMS (AND COMMISSIONER YARBOROUGH) REQUIRING PROOF OF DAMAGES AS OF JUNE 30, 1908, IS IN CONFLICT WITH THE LAW OF THE CASE AND THE FEDERAL RULE ON DAMAGES IN CASES INVOLVING THE CANCELLATION OF MINERAL ROYALTIES.

CONFLICT UNDER QUESTION 9.

The Court of Claims upheld Commissioner Yarborough's separate concurring opinion that "June 30, 1908, must be the pertinent date here," that this petitioner "failed to prove any damages as of this date in its hearings before the Commission," and "therefore its claim should be rejected." (App. p. 17a). Thus, in this claim, based upon fair and honorable dealings, the Court of Claims confined the claim to strict legal rules of damages applicable solely to land "taking" cases under the Fifth Amendment. See cases cited by the Court of Claims (App. p. 16a). The above holding is in conflict with other decisions of the Court of Claims. Thus, in *Seminole Nation v. United*

States, 203 Ct. Cl. 637, __, fn. 11, 492 F.2d 811, 817, fn. 11 (1974), the Court held:

> "The defendant is very wide of the mark when it urges that appellant has no standing under the fair and honorable dealings clause (clause 5) to point to railroad activities after March 1, 1909, because the abandoned railroad station reservations became vested as a mattter of law, under the 1906 Act, in the adjoining owners or municipalities on that date. Clause 5 is not limited to legal rights, and the Nation can show the destruction of its legal rights, as of March 1, 1909, even if constitutional, caused it injury which should now be redressed in fair measure under that provision of the Indian Claims Commission Act. If the railroad's gains after March 1909 are taken into account, it will not be because appellant is 'legally" entitled to such sums but because those gains are considered an appropriate and equitable measure of redress under clause 5."

CONFLICTS UNDER QUESTION 10.

The Commission's order of June 24, 1966 (App. pp. 81a-82a), directed that "the instant suit proceed on the single issue of proof of actual damages suffered by the Seminole Nation itself, as a direct consequence of the wrongful act of the defendant." The order did not limit proof of damages to June 30, 1908. On July 7, 1971, the Commission overruled the motion of the United States to dismiss for failure to prove damages as of June 30, 1908 (App. p. 83a). Nevertheless, Commissioner Yarborough's separate concurring opinion (affirmed by the Court of Claims) held

that petitioner had failed to prove damages as of that date. So the law of the case as to proof of damages was changed after the trial on damages in 1969, without giving petitioner an opportunity to prove them as of 1908. Therefore, this holding results in a denial of due process of law.

In *Angle v. Chicago, St. Paul, Minneapolis and Omaha Ry. Co.*, 151 U.S. 1, 19 (1894), this Court held that the right to prove damages is a property right which is protected by the 5th Amendment.

In *Garfield v. United States ex rel. Goldsby*, 211 U.S. 249, 262 (1908), involving the striking of an Indian's name from the tribal rolls without notice and hearing, this Court held:

> "***it has always been recognized that one who has acquired rights by an administrative or judicial proceeding cannot be deprived of them without notice and an opportunity to be heard.
>
> "*The right to be heard before* property is taken *or rights or privileges withdrawn which have been previously legally awarded* is of the essence of due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this court." (italics ours).

See also *Gearinger v. United States*, 188 Ct. Cl. 512, 517, 412 F.2d 862, 865 (1969); and 1 B Moore, *Federal Practice*, par. 0.404(1), pp. 402, 405, 406; par. 0.404(4), pp. 451, 452.

Since the 1966 order of the Commission unquestionably was the law of the case at the trial on damages in 1969, and petitioner was never given the chance to prove damages as of 1908, the 1972 opinion of Commissioner Yarborough, and the 1974 opinion of the Court of Claims, are in conflict with the above decisions of this Court, other decisions of the Court of Claims, and other Federal Appeals Courts.

CONFLICTS UNDER QUESTION 11.

The Court of Claims decision and the opinion of Commission Yarborough limit proof of damages to June 30, 1908. (App. pp. 16a, 17a). These holdings are in conflict with the federal rule on damages followed by the Court of Claims and other Federal Courts in cases involving loss of royalties from cancellation of oil leases. In *Federal Land Bank of Houston v. United States,* 144 Ct. Cl. 173, 178, 179, 168 F. Supp. 788, 791, 792 (1958), a fair dealing case involving an oil lease, that court held that the Government was "in violation of the 'fair dealing and diligence' rule above set forth and resulted in a breach of contractual duty which was owed to plaintiff" (at p. 178). It then held that "the loss of royalty interest should be measured by the amount of oil actually taken from the land in question" (at p. 179). A similar rule is followed by the Federal Courts.

The application of the rule as to royalty interests in minerals in Oklahoma lands is illustrated in *Bloch v. Sun Oil Corp.,* 335 F. Supp. 190, 192 (1971). In that case the District Court held:

> "***No one can seriously contend that an oil and gas lease is but a unilateral obligation to pay royalties. The question, nevertheless,

> has been resolved in Oklahoma and damages for breach of an oil and gas lease include both accrued and future royalties.***"

See also *Empire Oil and Refining Co. v. Hoyt*, 112 F. 2d 356, 361 (1940).

CONCLUSION

The national interest in the welfare of American Indian tribes is indisputable, and is reflected in the passage of the Indian Claims Commission Act of 1946. This petition, involving that Act, presents many conflicts between the Court of Claims, this Court, and other Federal Courts, which have never been specifically resolved by this Court.

For the reasons set forth herein, this petition for a writ of certiorari to the United States Court of Claims should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBTER TERM, 1974

No. 74-272

THE SEMINOLE NATION OF OKLAHOMA,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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APPENDIX A

In the United States Court of Claims

Appeal No. 4-73

Ind. Cl. Comm. Docket No. 204

17 Ind. Cl. Comm. 67
28 Ind. Cl. Comm. 117

(Decided June 19, 1974)

THE SEMINOLE NATION OF OKLAHOMA

v.

THE UNITED STATES

Paul M. Niebell, attorney of record, for appellant.
Bernard J. Rothbaum, Jr., with whom was *Assistant Attorney General Wallace H. Johnson*, for appellee.

Before DAVIS, NICHOLS, and BENNETT, *Judges*.

ON APPEAL FROM THE INDIAN CLAIMS COMMISSION

BENNETT, *Judge*, delivered the opinion of the court:

Appellant, the Seminole Nation, appeals from a May 31, 1972 Indian Claims Commission decision [1] vacating a favorable June 24, 1966 order [2] and dismissing appellant's peti-

[1] 28 Ind. Cl. Comm. 117 (1972).
[2] 17 Ind. Cl. Comm. 67 (1966).

tion. For reasons which we shall hereafter set out, we affirm the 1972 decision of the Indian Claims Commission. 2

Appellant brought its original complaint before the Indian Claims Commission on August 6, 1951, seeking judgment for the actual loss it incurred because of the alleged wrongful action of the United States in divesting the Seminole Nation of a one-half interest in the royalties on all minerals recovered from the area encompassed within the former Seminole Reservation established by the Treaty of March 21, 1866.[3] Appellant contended that its tribal right to receive such royalties was reserved under the express terms of the Seminole Agreement between the United States and the Seminole Nation, ratified by Act of July 1, 1898.[4]

Appellant, whose ancestral home was in Florida, was forced to migrate west of the Mississippi into what is now Oklahoma following a war with the United States. As a result of the Treaty of March 21, 1866,[5] appellant held its Indian Territory lands in fee simple.[6] By 1882, appellant owned approximately 365,000 acres of Indian Territory.[7]

In 1893, Congress changed its position with regard to appellant and four other tribes, the Cherokees, Creeks, Choctaws, and Chickasaws, all known collectively as the Five Civilized Tribes, and created the Dawes Commission.[8] It was the assigned duty of this commission to negotiate agreements with the Five Civilized Tribes for allotment and division of their tribal lands among tribe members "to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said India [sic] Territory."[9]

The Dawes Commission was not immediately successful in securing agreements with the Five Civilized Tribes. After considerable haggling, the agreement between the commission and the Seminoles was entered into in 1897 and approved by

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[3] 14 Stat. 755 (1866).

[4] Ch. 542, 30 Stat. 567 (1898).

[5] 14 Stat. 755 (1866).

[6] Appellant acquired an additional area of 175,000 acres east and contiguous to its original tract under the Act of Aug. 5, 1882, ch. 390, 22 Stat. 257, 265.

[7] *Seminole Nation* v. *United States*, 102 Ct. Cl. 565, 589–92, 617–24, 632 (1944), *cert. denied*, 326 U.S. 719 (1945); *Creek Nation* v. *United States*, 93 Ct. Cl. 561 (1941).

[8] Act of March 3, 1893, ch. 209, § 16, 27 Stat. 645.

[9] Ch. 209, § 16, 27 Stat. 645 (1893).

Congress on July 1, 1898.[10] The agreement, in pertinent part, provided as follows: 3

> All lands belonging to the Seminole tribe of Indians shall be divided into three classes, designated as first, second, and third class; the first class to be appraised at five dollars, the second class at two dollars and fifty cents, and the third class at one dollar and twenty-five cents per acre, and the same shall be divided among the members of the tribe so that each shall have an equal share thereof in value, so far as may be, the location and fertility of the soil considered; giving to each the right to select his allotment so as to include any improvements thereon, owned by him at the time; and each allottee shall have the sole right of occupancy of the land so allotted to him, during the existence of the present tribal government, and until the members of said tribe shall have become citizens of the United States. Such allotments shall be made under the direction and supervision of the Commission to the Five Civilized Tribes in connection with a representative appointed by the tribal government; and the chairman of said Commission shall execute and deliver to each allottee a certificate describing therein the land allotted to him.
>
> * * * * *
>
> No lease of any coal, mineral, coal oil, or natural gas within said Nation shall be valid unless made with the tribal government, by and with the consent of the allottee and approved by the Secretary of the Interior.
>
> Should there be discovered on any allotment any coal, mineral, coal oil, or natural gas, and the same should be operated so as to produce royalty, one-half of such royalty shall be paid to such allottee and the remaining half into the tribal treasury until extinguishment of tribal government, and the latter shall be used for the purpose of equalizing the value of allotments; and if the same be insufficient therefor, any other funds belonging to the tribe, upon extinguishment of tribal government, may be used for such purpose, so that each allotment may be made equal in value as aforesaid.
>
> * * * * *
>
> When the tribal government shall cease to exist the principal chief last elected by said tribe shall execute, under his hand and the seal of the Nation, and deliver to each allottee a deed conveying to him all the right, title, and interest of the said Nation and the members thereof in and to the lands so allotted to him, and the Secretary

[10] Ch. 542, 30 Stat. 567 (1898); hereinafter sometimes the 1898 Agreement.

of the Interior shall approve such deed, and the same 4
shall thereupon operate as relinquishment of the right, title, and interest of the United States in and to the land embraced in said conveyance, and as a guarantee by the United States of the title of said lands to the allottee; and the acceptance of such deed by the allottee shall be a relinquishment of his title to and interest in all other lands belonging to the tribe, except such as may have been excepted from allotment and held in common for other purposes. Each allottee shall designate one tract of forty acres, which shall, by the terms of the deed, be made inalienable and nontaxable as a homestead in perpetuity.

All moneys belonging to the Seminoles remaining after equalizing the value of allotments as herein provided and reserving said sum of five hundred thousand dollars for school fund shall be paid per capita to the members of said tribe in three equal installments, the first to be made as soon as convenient after allotment and extinguishment of tribal government, and the others at one and two years, respectively. Such payments shall be made by a person appointed by the Secretary of the Interior, who shall prescribe the amount of and approve the bond to be given by such person; and strict account shall be given to the Secretary of the Interior for such disbursements. [30 Stat. 567–68.]

As appears evident, from the terms of the agreement, the parties went to great lengths to insure that the allotments to individual Indians would be as equal as possible. Lands known to contain mineral deposits were not allotted to tribe members. These lands instead were leased or sold to private entrepreneurs and the proceeds from such sales were paid into the tribal treasury for eventual per capita distribution. *Cf. Seminole Nation* v. *United States*, 102 Ct. Cl. 565, 628 (1944), *cert. denied*, 326 U.S. 719 (1945); *Fish* v. *Wise*, 52 F. 2d 544, 545 (10th Cir. 1931), *cert. denied*, 284 U.S. 688 (1932). Special provision also was made for minerals discovered on allotted lands after allotment and before extinguishment of the tribal government. One-half of the royalties received from the recovery of such minerals was to be paid to the tribal treasury to be used to equalize the value of the allotments, and later, upon extinguishment of the tribal government, for a school fund ($500,000). Whatever remained after establishment of the school fund was to be paid

out *per capita* to members of the tribe in three equal installments. 5

Deeds in fee simple were to issue to the allottees "when the tribal government * * * cease[d] to exist * * *." By statute, this date was first set for March 4, 1906.[11] On March 2, 1906, however, Congress enacted a joint resolution extending the existence of the Five Civilized Tribes:[12]

> * * * the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations of Indians in the Indian Territory are hereby continued in full force and effect for all purposes under existing laws until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members of said tribes unless hereafter otherwise provided by law.

Determination to extend the tribal government indefinitely required that some provision be made for final conveyances of allotment deeds. This was done by the Act of April 26, 1906, which provided for the execution of deeds "prior to the time when the Seminole government shall cease to exist."[13] This implemented the intent of the 1898 Agreement.

Thereafter, on May 27, 1908, Congress passed legislation "[f]or the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, * * *."[14] Section 11 of this Act spoke to the one-half portion of mineral royalties reserved to the Seminole tribal treasury by the 1898 Agreement:[15]

> SEC. 11. That all royalties arising on and after July first, nineteen hundred and eight, from mineral leases of allotted Seminole lands heretofore or hereafter made, which are subject to the supervision of the Secretary of the Interior, shall be paid to the United States Indian agent, Union Agency, for the benefit of the Indian lessor or his proper representative to whom such royalties shall thereafter belong; and no such lease shall be made after said date except with the allottee or owner of the land: *Provided*, That the interest of the Seminole Na-

[11] Act of March 3, 1903, ch. 994, § 8, 32 Stat. 1008.
[12] Res. 7 of March 2, 1906, 34 Stat. 822.
[13] Ch. 1876, § 6, 34 Stat. 139 (1906).
[14] Act of May 27, 1908, ch. 199, 35 Stat. 312; hereinafter sometimes the 1908 Act.
[15] Ch. 199, § 11, 35 Stat. 316 (1908).

tion in leases or royalties arising thereunder on all allotted lands shall cease on June thirtieth, nineteen hundred and eight. 6

Thus, though the tribal government continued to exist for some purposes, the Act of 1908 terminated the tribe's one-half interest in mineral royalties and vested that property right in the owners of the fee. As such, the 1908 Act was consistent with the purpose of the 1898 Agreement—to transfer Indian territory land in fee to individual Indian allottees in preparation for statehood.

Appellant disagrees with this analysis. It bases its claim on its interpretation of the legislative history here involved and the aforementioned 1966 order of the Indian Claims Commission. Appellant's claim is that the 1898 Seminole Agreement, while allotting the surface of the Seminole tribal domain to the enrolled tribe members, and giving each allottee a one-half interest in the minerals under his allotment, reserved one-half of the royalties on all minerals recovered from the allotted lands to the Seminole Nation as long as that nation remained in existence. Appellant argues that the United States assumed full administrative control over the Seminole Nation by terms of the 1898 Agreement and consequently was under a duty to manage and protect tribal property, including the one-half interest in the mineral royalties. Appellant maintains that the Seminole tribal government was extended by the Act of March 2, 1906, and that such extension, never having been revoked, is controlling here. Appellant dismisses the 1908 Act and its language terminating the tribal right to one-half the mineral royalties as an act passed in violation of the "fair and honorable" dealings clause—section 2, clause 5, of the Indian Claims Commission Act of 1946.[16] Such contention, appellant asserts, is supported by the 1966 Indian Claims Commission order in this case.[17]

Appellant timely filed a petition before the Indian Claims Commission on August 6, 1951. The matter thereafter proceeded in due course to a trial on the merits. On June 24, 1966, the Indian Claims Commission issued an opinion and

[16] 25 U.S.C. § 70(a); ch. 959, § 2, 60 Stat. 1050 (1946).
[17] 17 Ind. Cl. Comm. 67 (1966).

findings in appellant's favor.[18] The commission's decision was critical of the efforts of the Commissioner of Indian Affairs with respect to the inclusion of section 11 in the 1908 Act. As the commission found: 7

> * * * the Commissioner of Indian Affairs did not advance the entire Section 11 as whole before the Senate Committee on Indian Affairs, but offered the proviso separately and surreptitiously at a stage in the proceedings where no minutes were being maintained and where consequent debate was unlikely. And finally, the section and proviso were apparently offered as a mere correction of a minor inconsistency and not as a major and far-reaching unilateral change in an existing agreement or treaty statute. [17 Ind. Cl. Comm. at 74.]

The commission absolved the Dawes Commission of culpability because it could not have known that Seminole land allotments had oil or gas deposits which were not found in commercial quantities until more than 25 years later. *Fish* v. *Wise*, *supra* at 545. But, it held that the acts of the Commissioner of Indian Affairs in persuading Congress to accept section 11, *supra*, "were inconsistent with the concept of fair and honorable dealings contemplated by Clause 5 of Section 2 of the Indian Claims Commission Act of 1946." 17 Ind. Cl. Comm. at 75. The commission did not rule on some other issues raised in the case such as whether it was a tribal claim, or whether the 1908 statute was inconsistent with the Seminole Agreement of 1898. The 1966 decision emphasized that no "theory of recovery or of computation of damages has been urged by the plaintiff to date. Hence, the commission must proceed on the assumption that if a justiciable controversy exists, the plaintiff will undertake to establish a viable theory of recovery and measure of damages at some future date." 17 Ind. Cl. Comm. at 82–83. A hearing was ordered on the issue of damages claimed to have been suffered as a result of actions of the Commissioner of Indian Affairs and Congress in connection with enactment of the 1908 public law.

At the hearing on damages on March 10, 1969, appellant presented evidence on the actual value of one-half of the oil

[18] *Id.*

and gas royalties allegedly due from 1923 to 1968, but previously paid to individual Seminole allottees or their transferees pursuant to public law. The claimed sums were said to exceed 95 million dollars. Appellee objected to such evidence on grounds of relevancy and materiality. Since appellant offered no evidence relating to the May 27, 1908 value of the property, appellee filed a motion to dismiss on the ground that appellant had failed to show any actual damages as of the date of alleged deprivation. This motion was denied and appellee was ordered to file requested findings of fact, objections and briefs on the issue of damages. Appellee complied with this order on January 12, 1972, under protest, and appellant thereafter filed a reply brief on January 26, 1972. 8

In examining the question of damages, the commission reconsidered the entire record in this case and the issues raised but not decided in 1966, and ultimately issued a decision reversing its 1966 holding and dismissing the petition.[19] Appellant is now before this court appealing the May 31, 1972 order vacating the opinion, findings and interlocutory order of June 24, 1966, which had been in appellant's favor.

In its 1972 decision, the commission met, head-on, the fundamental issues avoided in 1966 and concluded that "no compensable property right [was] created and vested in the Seminole Nation pursuant to the Seminole Agreement of 1898." 28 Ind. Cl. Comm. at 123. It was decided that to have had any vested tribal interest in the mineral royalties would have been contrary to the ultimate purpose of the 1898 Act—division and allotment. The equalization fund established in the 1898 Agreement was created for a limited period of time for the purpose of insuring that the allotment would be as equal as possible for individual Seminole allottees. From the conclusion that appellant had no compensable property right created in 1898, it was reasoned that none existed which could have been divested in 1908. With respect to the actions of the Commissioner of Indian Affairs, the prevailing opinion held that he had not been involved in any "improper conduct" and that he had merely been acting in his "ministerial capacity" to carry out what had been intended by the 1898 Seminole Agreement and that the evidence did not support the 1966

[19] 28 Ind. Cl. Comm. 117 (1972).

findings to the contrary. As to section 11 of the 1908 Act, it was said to be simply to clarify the payment of royalties and the Government derived no benefit from it. It was further found that nothing in connection with the passage of the 1908 Act could give rise to a cause of action under section 2, clause 5, of the Indian Claims Commission Act. The prevailing opinion said "[e]very effort was made to provide for allotments which were equal in value. Further, any failure to allot each member a mathematically equal share would merely affect the personal property interests of the individual Seminole allottees. Such individual claims are beyond this Commission's jurisdiction, * * *." 28 Ind. Cl. Comm. at 128. Finally, the commission rejected the notion that the Dawes Commission had acted wrongfully in dividing the Seminole lands by value without taking into account the value of the latent oil deposits within some allotments. "The Dawes Commission could not have known that any of the allotments included oil deposits." 28 Ind. Cl. Comm. at 128. 9

Pursuant to its decision, the commission vacated its previous findings and opinion and dismissed appellant's petition.

The commission's decision was not unanimous. One commissioner concurred in the result on account of appellant's failure to prove damages as of 1908. Two commissioners dissented from the commission's decision. It was their opinion that the 1966 findings of fact and opinion were proper and justified and should not be set aside. Appellant's motion for rehearing was denied by the commission on January 26, 1973.

Appellant thereafter filed an appeal in this court criticizing the factual determinations made by the commission in its 1972 opinion, contending that the commission had used technical legal principles to reject a valid "fair and honorable dealings" claim and asserting that the 1898 Seminole Agreement gave the Seminole Nation a vested interest in one-half of the mineral royalties taken from allotted lands, that the 1908 Act was not passed in good faith, and that its proof of actual damages suffered by the Seminole Nation was not erroneous since such damages were a direct consequence of appellee's wrongful act.[20]

[20] Appellant has argued that the appeal presents 13 questions for review. We consider those necessary for deciding the appeal.

Appellee responded to appellant's claims, contending that it was this court's duty to consider only whether the 1972 commission decision was supported by substantial evidence and was in accord with applicable law. For reasons which follow, we agree with appellee and hold that the May 31, 1972 decision of the Indian Claims Commission was correct.

In the first place, this court has held in *Confederated Tribes of Warm Springs Reservation* v. *United States*, 177 Ct. Cl. 184 (1966), that an administrative tribunal has the right to vacate a previous judgment and enter a new decision as long as such a matter is still within the ken of the agency's jurisdiction and it acts within a reasonable time on a rational basis. In *Warm Springs*, the commission issued an order favorable to appellants on June 10, 1960. Appellee thereafter filed a motion for rehearing which was denied on October 10, 1963. At the same time it denied the motion for rehearing, however, the commission set aside its 1960 findings and order and entered a new order, together with new findings of fact and conclusions of law. As in the present case, the new order was less favorable to appellant than the original order. In support of its decision, this court quoted language from *Shein* v. *United States*, 102 F. Supp. 320, 323 (1951), *aff'd*, 343 U.S. 944 (1952):

> * * * "If upon deeper research, fuller reflection and consideration, the judicial or quasi-judicial body would see a mistake but persist in it, this would amount to mere obstinacy or stubbornness and foster the highest form of injustice." [177 Ct. Cl. at 192.]

In *Shein*, the Interstate Commerce Commission, acting on a motion for reconsideration by an intervenor and without taking any new evidence, reconsidered and revised an earlier holding.

In *Warm Springs*, this court viewed its function as one of determining whether there had been an abuse of discretion or a failure to exercise discretion on the part of the administrative body. The court held that once a rational basis for the revised opinion had been found, the reviewing function of this court ended. 177 Ct. Cl. at 192. Once the original order had been vacated by the subsequent order, the original order became legally "nonexistent" and "not subject to appeal." 177 Ct. Cl. at 193.

The analysis employed in *Warm Springs* is supported by our recent opinion in *Gila River Pima-Maricopa Indian Community* v. *United States*, App. No. 14–72, —— Ct. Cl. ——, —— (slip op. p. 11, April 1974). 11

> * * * As the expert in this field charged with primary responsibility, the Commission is the tribunal to exercise this discretion; all the court can or should do is to oversee and keep it within rational bounds. *Cf. The Snake or Piute Indians* v. *United States*, 125 Ct. Cl. 241, 254–55 (1953).

In reviewing the May 31, 1972 commission decision, this court must look to the manner in which that body exercised the discretion granted it in the Indian Claims Commission Act of 1946.[21] As soon as a rational basis can be found for the commission's decision, this court's reviewing function is complete. For purposes of our consideration, the 1966 order of the Indian Claims Commission shall have no force or effect. It is a nullity.

In the first part of its brief to this court, appellant has attempted to have this court retry factual matters already determined by the commission in its 1972 findings of fact and prevailing opinion. Appellant bases its argument, to a large extent, on the 1966 opinion in this case, a decision which we have ruled to be "nonexistent" for purposes of our analysis here. Since only the 1972 opinion is presently before the court and since we agree with the commission's conclusion that the Commissioner of Indian Affairs was acting in his ministerial capacity in carrying out the purpose of the 1898 Seminole Agreement when he caused the aforementioned section 11 to be included in the Act of May 27, 1908, we must reject appellant's argument that the majority of the commission erred in failing to find essential facts necessary for the proper determination of this case. What appellant has really requested this court to do is to reweigh, de novo, the evidence presented to the commission. Such action would not be proper. 25 U.S.C. § 70s(b) provides in part:

> * * * On said appeal the Court shall determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law,

[21] 25 U.S.C. § 70, *et seq.*, ch. 959, 60 Stat. 1049 (1946).

including any conclusions respecting "fair and honorable dealings", where applicable, * * * are valid and supported by the Commission's findings of fact. 12

With respect to this statutory provision, the court has indicated that—

> * * * our responsibility ends when we are satisfied that the findings of the Indian Claims Commission are supported by substantial evidence. That we might have reached a contrary result on the evidence is not the test. * * *. [*United States v. Seminole Nation*, 146 Ct. Cl. 171, 180, 173 F. Supp. 784, 790 (1959). *Cf. Lummi Tribe* v. *United States*, 181 Ct. Cl. 753, 757 (1967).]

Since we are convinced that the commission had a rational basis for concluding that the 1908 legislation was a necessary evolution of the 1898 Seminole Agreement, we must reject appellant's contentions.

Appellant's argument that this court should not employ technical legal principles to reject a moral claim based upon "fair and honorable dealings" must also be rejected since appellant has no "moral claim" here. Whatever "moral claim" appellant might have had in this matter went by the board when the commission vacated its 1966 judgment concerning a violation of the "fair and honorable dealings" clause of the Indian Claims Commission Act of 1946. Since the prevailing opinion of May 31, 1972, now before the court, states there was no violation of the "fair and honorable dealings" clause—and that conclusion is based on substantial evidence—and is correct—appellant's argument must be rejected. As has been noted in other opinions of this court, the Indian Claims Commission Act is not a "catchall" for all deprivation—physical, psychological, social, economic and cultural—visited upon the Indian people as a result of the actions of the United States. Rather, the act is a "synthesis of those * * * classes of cases * * * which * * * heretofore received congressional consideration in the form of special jurisdictional acts." *Gila River Pima-Maricopa Indian Community* v. *United States*, 190 Ct. Cl. 790, 801, 427 F. 2d 1194, 1200, *cert. denied*, 400 U.S. 819 (1970).

Appellant contends that by the terms of the 1898 Seminole Agreement, the Seminole Nation received a vested interest in

a one-half portion of the mineral royalties recovered from Seminole tribal lands and that such interest could not be arbitrarily abrogated by the 1908 statute. *Cf. Choate* v. *Trapp*, 224 U.S. 665, 674 (1912). Such an argument is incorrect *ab initio*. In *Choate* v. *Trapp*, the Supreme Court considered the tax exempt status of property allotted to individual Indians pursuant to the Atoka Agreement negotiated between the Dawes Commission and two of the Five Civilized Tribes in 1897 and approved by Congress as part of the Curtis Act on June 28, 1898.[22] The Court ruled that Congress could not, by statute, lift the tax exemption without engaging in a taking barred by the Fifth Amendment. In the instant case, the Seminole Nation was impressed only with the duty to maintain royalty funds until such could be paid to individual Seminole allottees. No vested right, similar to the tax exemption granted as part of the Atoka Agreement, accrued to the Seminole Nation as part of the 1898 Seminole Agreement. The 1898 Agreement established only an "equalization fund" to provide a means by which allotments made to individual Indians could be equalized as to value. As such, the Seminole Nation served only as a temporary stakeholder with respect to the interests of its member-allottees. In the 1908 legislation, Congress indicated that the purpose of having such a temporary stakeholder had been satisfied and that such funds as had formerly been turned over to the Seminole Nation for allotment equalization should thereafter be paid direct to the individual allottees. 13

Our conclusion in this instance is supported by the Tenth Circuit's opinion in *Moore* v. *Carter Oil Co.*, 43 F. 2d 322 (10th Cir. 1930), *cert. denied*, 282 U.S. 903 (1931), wherein that court considered the same provisions of the 1898 Agreement and the 1908 Act as are here involved.

> * * * The inference that the allottee should receive all of the royalty on the expiration of the *temporary* period is unavoidable; else what purpose can be attributed to the * * * paragraph, which gave the allottee a right to title in fee at the expiration of the *temporary period* and debars the Nation and all its other members of any right, title or interest therein.

[22] Ch. 517, 30 Stat. 505 (1898).

> * * * Later Congress passed the Act of May 27, 1908 (35 Stat. 312), in the eleventh section of which it expressed in substance its finding that the special purpose of paying one-half of the royalties under mineral leases into the tribal treasury had been accomplished, * * *. [Emphasis supplied. 43 F. 2d at 325.]

Cf. Goat v. *United States*, 224 U.S. 458 (1912); *Fish* v. *Wise*, *supra*.

Congress consequently declared, in section 11, that the Seminole Nation's interest in the leases or the royalties arising under the leases would be terminated as of June 30, 1908, directed that royalties arising thereafter go directly to the allottees of the land or their proper representatives, and ordered that no such lease should be made after June 30, 1908, except with the allottee or owner of a particular allotment. Ch. 199, § 11, 35 Stat. 316; 43 F. 2d at 325.

Indeed, the Indian Claims Commission reached an identical conclusion in its consideration of appellant's claim:

> The Seminole equalization fund was created for the special purpose of equalizing the value of the allotments. And the payments of one-half of the royalties from allotted lands were to cease when the conveyances were made to the allottees. * * *. It is clear from the negotiations and the agreement itself, particularly those provisions requiring per capita payments of all remaining tribal funds, that the intent of all the parties was that all property interest would vest in the allottees and that the allottees would in return relinquish any interest in other tribal lands. To have vested any mineral estate in the tribe would have been contrary to the manifest intent of dissolving the tribal government and ending the communal system of land ownership. [28 Ind. Cl. Comm. at 123–24.]

Appellant's attempt to distinguish *Moore* by reason of the fact that it was decided prior to passage of the Indian Claims Commission Act is without merit. The court in *Moore* determined the effect of the 1898 Seminole Agreement and subsequent legislation regarding the one-half portion of mineral royalties. Absent a determination of a violation of the "fair and honorable dealings" clause, the applicability of *Moore* was in no way affected by passage of the Indian Claims Commission Act.

Appellant's reliance on the commission's 1966 decision is misplaced. This court has only the obligation to review the 1972 commission decision under standards already enunciated in this opinion. *Suquamish Tribe* v. *United States*, 197 Ct. Cl. 775 (1972). Our review of the 1972 opinion convinces us that it was rationally concluded that the Commissioner of Indian Affairs acted pursuant to the ministerial powers granted him in the 1898 Agreement when he sought to obtain passage of the 1908 legislation. This conclusion represents no abuse of discretion. 15

Even if this court had found that appellant's rights had been violated, it would not be possible for this court to determine that any damages were actually due the Seminole Nation as a result of defendant's actions. Appellant was acting as a mere stakeholder under the 1898 Seminole Agreement. That agreement directed that the one-half-the-royalities fund paid to appellant—

> * * * *shall be used* for the purpose of equalizing the value of allotments;
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> * * * * *
>
> All moneys belonging to the Seminoles remaining after equalizing the value of allotments as herein provided and reserving said sum of five hundred thousand dollars for school fund *shall be paid* per capita to the members of said tribe in three equal installments, * * *. [Ch. 542, 30 Stat. 567–68 (1898). Emphasis supplied.]

In effect the agreement established an express trust with the tribal government as trustee and the individual allottees as beneficiaries. No rights vested in the tribal government, only duties. Appellant, in its own right, had no independent property interest redressable in this court. It was required to distribute all royalties which it received. The effect of the 1908 legislation was to terminate the equalization fund and cause a final distribution of the corpus, as provided above. The appellee created the trust and in the exercise of proper discretion could and did terminate it on whatever grounds would best serve the beneficiaries. It was not an irrevocable trust, and appellant was not a beneficiary of it.

As our determinations thus far have indicated, the Act of May 27, 1908, was simply an implementing statute designed

to carry into effect the purpose of the 1898 Seminole Agreement, according to its express terms. Congress and the Commissioner of Indian Affairs acted in good faith in terminating the equalization fund. Their actions in no way violated the "fair and honorable dealings" provision of the Indian Claims Commission Act of 1946. On the contrary, their actions were designed to make it possible for the individual Seminole allottees to receive all the royalties just as had been done for the Indians of the other four Civilized Tribes. The 1898 Agreement with the Seminoles had differed from arrangements with the other tribes in that particular. This is the explanation given to the Secretary of the Interior in his 1908 report by the Commissioner of Indian Affairs describing the purpose of section 11 of the 1908 Act. The prevailing commission opinion has rightly rejected appellant's argument and the 1966 finding that this amounted to some sort of fraud or conspiracy between the Commissioner of Indian Affairs and Congress to defraud appellants of a vested right by enactment of the 1908 law, even assuming that speculation as to the motivation of Congress in enacting a statute is a permissible subject of judicial inquiry. Appellants have cited no cases to demonstrate that the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 25 U.S.C. § 70 *et seq.*, vitiates the established rule to the contrary. *Fletcher* v. *Peck*, 8–11 U.S. (6 Cranch) 328 (1809). *See also Palmer* v. *Thompson*, 403 U.S. 217, 224–26 (1971); *United States* v. *O'Brien*, 391 U.S. 367, 383–85 (1968); *Arizona* v. *California*, 283 U.S. 423, 455–56 (1931).

In his separate concurring opinion, Commissioner Yarborough pointed out that under appellant's theory of the case, tribal property was wrongfully taken on June 30, 1908. As a result, since no vestige of any sort of tribal interest in the royalty fund remained after that date, it is necessary that appellant prove damages as of June 30, 1908. *United States* v. *Klamath & Modoc Tribes*, 304 U.S. 119, 123–24 (1938). *Cf. Klamath & Modoc Tribes* v. *United States*, 193 Ct. Cl. 670, 693, 436 F. 2d 1008, 1020 (1971). In *Shoshone Indians* v. *United States*, 85 Ct. Cl. 331 (1937), *aff'd*, 304 U.S. 111 (1938), a pre-1946 "moral claim" upon which Congress had specifically allowed suit, this court held that valuation must

be determined on the date of the taking. This rule of law is unquestioned in taking cases and is no less viable in this claim for a breach of fair and honorable dealings predicated on an alleged taking. Since no violation of the Indian Claims Commission Act is involved, the date of the alleged taking, June 30, 1908, must be the pertinent date here. Since appellant failed to prove any damages as of this date in its hearing before the Indian Claims Commission, its claim would have to be rejected or remanded for further proof if liability were found under some theory. The dissenters address the issue of valuation with studied silence. As heretofore noted, the 1966 decision provided that "on the assumption that if a justiciable controversy exists, the plaintiff will undertake to establish a viable theory of recovery and measure of damages." The assumption of a justiciable controversy not having been established on the commission's ultimate consideration of the whole record, and no viable theory of recovery or measurement of damages having been satisfied by appellant's proof, its claim must fail. 17

For the reasons given, we affirm the May 31, 1972 order of the Indian Claims Commission directing that appellant's petition be dismissed.

Affirmed.

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APPENDIX B
28 Ind. Cl. Comm. 117-129
BEFORE THE INDIAN CLAIMS COMMISSION 117

THE SEMINOLE NATION, *Plaintiff,*	:	
v.	:	**Docket No. 204**
THE UNITED STATES OF AMERICA, *Defendant.*	:	

Decided: May 31, 1972

Appearances:

Roy St. Lewis and Paul M. Niebell, Attorneys for the Seminole Nation [of Oklahoma].

Clifford R. Stearns, with whom was Mr. Assistant Attorney General Kent Frizzel, Attorneys for Defendant.

OPINION OF THE COMMISSION

Kuykendall, Chairman, delivered the opinion of the Commission.

The claims of the Seminole Nation in this case have been brought under Clauses 1, 4 and 5 of Section 2 of the Indian Claims Commission Act (60 Stat. 1049, 1050), it having been alleged that the United States actionably wronged the Seminole Nation by certain actions of the Dawes Commission relating to the allotment of Seminole

land and by terminating the interest of the Seminole Nation in an "equalization fund" to be financed by one-half of all oil or mineral royalties accruing to the allotments. In its previous decision in this case[1] the Commission found 118
that the Dawes Commission had not acted wrongfully in its division of the allotments, but the Commission did find that the Commissioner of Indian Affairs had actionably wronged plaintiff in the process of securing legislation in 1908 which terminated the Seminole Nation's equalization fund. The Commission concluded that the United States had violated the concept of fair and honorable dealings and was therefore liable to plaintiff for actual damages suffered by the Seminole Nation resulting from the termination.

At the hearing on the issue of the damages suffered by the Seminole Nation, plaintiff presented evidence of the actual value of one-half of the royalty interest in all the oil and gas produced within the original Seminole lands from 1923 through 1968.[2] That value was computed by plaintiff at over 95 million dollars. Defendant objected to the evidence on the ground that it was immaterial and irrelevant to the issue of damages. While not conceding the correctness of the Commission's initial decision, it was defendant's position that any damages should be measured by the value of the rights terminated as of the date of deprivation. That date would be May 27, 1908, in this case. Since plaintiff did not offer any evidence relating to the 1908 value of the terminated rights, defendant moved to

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[1] *Seminole Nation v. United States*, 17 Ind. Cl. Comm. 67 (1966).

[2] Plaintiff could not present "any reliable data" on production of oil and gas from 1908 to 1923.

dismiss on the ground that plaintiff failed to show any actual damages as of 1908. This motion was denied on July 7, 1971, and defendant was ordered to file requested findings of fact, objections and briefs on the issue of dam- 119
ages to which order defendant complied on January 12, 1972. Plaintiff filed a reply brief on January 26, 1972.

In examining the question of damages we have reconsidered the entire record in this case and the initial Commission decision. In reviewing those materials, especially in the light of two significant court decisions, we have now determined that the 1966 decision of the Commission should be set aside.

The Seminole Nation was one of the Five Civilized Tribes all of which were removed from their aboriginal lands in the eastern part of the United States to lands purchased and set apart from them in Indian Territory, in what is now the State of Oklahoma. The United States had agreed that the Seminole lands would never be included in any territory or state and the Seminoles would be secured in the unrestricted right of self-government and full jurisdiction over all persons and property within their lands.[3] However, by the early 1890's, with the expansion of the United States, whites had crowded into the Indian Territory and actually outnumbered the Indian population. The United States considered it desirable, if not imperative, that the tribal governments in the Indian Territory be terminated and the area be brought under the dominion of the laws of the United States.

For a number of years it had been the general policy of the Federal Government to allot Indian tribal property

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[3] Treaty of August 7, 1856 (11 Stat. 699); Treaty of March 21, 1866 (14 Stat. 755); Act of August 5, 1882 (22 Stat. 265).

among the tribe's members and to confer citizenship upon 120
the allottees. To this end the General Allotment Act had been enacted on February 8, 1887 (24 Stat. 388). However, since the Five Civilized Tribes were considered to have vested property rights in their communal lands, there was doubt as to the legality of any allotment, and the Five Civilized Tribes were specifically excepted from the provisions of the General Allotment Act.

In an effort to encourage the Five Civilized Tribes to voluntarily end their communal system of land ownership, the Congress, by Section 15 of the Indian Appropriation Act of March 3, 1893 (27 Stat. 612, 645), gave express consent to allotments, not to exceed 160 acres to any one individual, and declared that the allottees should be deemed to be citizens of the United States and that the reversionary interest of the United States in the allotted lands should cease. By Section 16 of the same act provision was made for the appointment of a commission to enter into negotiations with each of the Five Civilized Tribes:

> for the purpose of the extinguishment of the national or tribal title to any lands within that Territory now held by any and all of such nations or tribes, either by cessions of the same . . . or by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively as may be entitled to the same . . .

This was the origin of the Commission to the Five Civilized Tribes, familiarly known as the Dawes Commission.

The Dawes Commission entered into negotiations with the several tribes but found them quite reluctant to accede to the wishes of Congress. Despairing of securing the voluntary acceptance of the allotment of communal land, Congress,

by the Act of June 10, 1896 (29 Stat. 321, 339), directed the Dawes Commission to begin formulating citizenship rolls, preliminary to mandatory allotment. Believing that a voluntary agreement would be preferable to mandatory allotment, the Seminole Nation began serious negotiations with the Dawes Commission. On December 16, 1897, an agreement was signed by the Dawes Commission and the Seminole Nation's negotiating committee. The agreement was ratified by the Seminole General Council on December 29, 1897, and approved by Congress without amendment by the Act of July 1, 1898 (30 Stat. 567). 121

The Seminole Agreement provided that all the lands belonging to the Seminole Nation should be divided among its members so that each should have an equal share thereof in value. It was provided that the tribal lands should be divided into three classes based upon fixed values of $5.00, $2.50, and $1.25 per acre and that each allottee would receive, as far as possible, land equal in value based on those classifications. Certain tracts to be used for school, church and tribal government purposes were excepted from allotment. The agreement provided that leases of any coal, mineral, coal oil, or natural gas within the Seminole Nation should be made with the tribal government, by and with the consent of the allottee and approved by the Secretary of the Interior. The "equalization fund" was created by the following paragraph of the agreement:

> Should there be discovered on any allotment any coal, mineral, coal oil, or natural gas, and the same should be operated so as to produce royalty, one-half of such royalty shall be paid to such allottee and the remaining half into the tribal treasury until extinguishment of tribal government, and the latter shall be used for

> the purpose of equalizing the value of allotments; and if the same be insufficient therefor, any other funds belonging to the tribe, upon extinguishment of tribal government, may be used for such purpose, so that each allotment may be made equal in value as aforesaid. (30 Stat. 567). 122

Since it was then anticipated that the Seminole tribal government would be terminated shortly upon the eventuality of statehood, the agreement stipulated that the allottees should receive their deeds from the principal chief "[w]hen the tribal government shall cease to exist." Such deed would convey

> . . . all the right, title, and interest of the said Nation and the members thereof in and to the lands so allotted . . .; and the acceptance of such deed by the allottee shall be a relinquishment of his title to and interest in all other lands belonging to the tribe, except such as may have been excepted from allotment and held in common for other purposes. (*Id.* at 568).

By the Act of March 3, 1903 (32 Stat. 982, 1008), it was provided that the Seminole tribal government should terminate no later than March 4, 1906. However, before that date was reached, Congress altered the plan and extended, with certain limitations, the tribal governments of the Five Civilized Tribes, including the Seminole Nation.[4]

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[4] Joint Resolution of March 2, 1906 (34 Stat. 822) and the Act of April 26, 1906 (34 Stat. 137, 148).

Congress also provided, in Section 6 of the Act of April 26, 1906 (34 Stat. 137, 139), for the execution of deeds to allottees "prior to the time when the Seminole government shall cease to exist."

The Seminole equalization fund was abolished pursuant to Section 11 of the Act of May 27, 1908 (35 Stat. 312, 316), which read as follows: 123

> That all royalties arising on and after July first, Nineteen Hundred and Eight, from mineral leases of allotted Seminole lands heretofore or hereafter made, which are subject to the supervision of the Secretary of the Interior, shall be paid to the United States Indian agent, Union Agency, for the benefit of the Indian lessor or his proper representative to whom such royalties shall thereafter belong; and no such lease shall be made after said date except with the allottee or owner of the land: *Provided,* That the interest of the Seminole Nation in leases or royalties arising thereunder on all allotted lands shall cease on June thirtieth, Nineteen Hundred and Eight.

Plaintiff contends that by the Seminole Agreement of 1898 a vested interest in one-half of the mineral royalties from Seminole allotted lands was reserved to the Seminole Nation. By the Act of May 27, 1908, *supra,* it is alleged, defendant took the said one-half royalty interest from the Seminole Nation, without its knowledge and consent, and without compensating the Seminole Nation therefor. The Commission now concludes that there was no compensable property right created and vested in the Seminole Nation pursuant to the Seminole Agreement of 1898.

The Seminole equalization fund was created for the special purpose of equalizing the value of the allotments. And the payments of one-half the royalties from allotted lands were to cease when the conveyances were made to the allottees. These two events were to occur when the tribal government should be extinguished. It is clear from the negotiations and the agreement itself, particularly those provisions requiring per capita payments of all remaining tribal funds, that the intent of all the parties was that all property interest would vest in the allottees and that the allottees would in return relinquish any interest in other tribal lands. To have vested any mineral estate in the tribe would have been contrary to the manifest intent of dissolving the tribal government and ending the communal system of land ownership. 124

The subsequent determination to continue the tribal government indefinitely required that some provision be made for the final conveyances of the allotment deeds. This was done by permitting the conveyances to be made forthwith (as provided in the Act of April 26, 1906, *supra*) and by fixing June 30, 1908, as the date for ceasing payment of half the royalties to the tribal treasury (Act of May 27, 1908, *supra*). These provisions were enacted for the purpose of carrying out the intent of the 1898 Agreement.

The provisions of the 1898 Agreement were considered by the Attorney General in an opinion of March 22, 1928 (35 Op. Att'y Gen. 421, 424-25), in which he concluded:

> The essence of the [Seminole] agreement was that the payment into the tribal treasury of one-half the royalties from allotted lands should cease when conveyances were made to the allottees.

That was plainly contemplated by the agreement because it stated that the deeds would operate to convey to the allottees complete title to the land and their acceptance should be a relinquishment of the interest of the allottees in other tribal lands, results inconsistent with the idea that the tribe should continue to have an interest in the minerals in the conveyed lands, or that any allottee should have any right to participate in royalties derived from the lands conveyed to other members of the tribe. The statement in the agreement of 1898 that payment into the tribal treasury of one-half the royalties should continue until the extinguishment of tribal government was only another way of saying that the payments should continue until the time arrived for making the conveyances. . . .When altering the plan, to provide that conveyances of allotments should be made prior to the end of tribal government, Congress might have provided that the payment of royalties to the tribe should cease as to each allotment when a deed should issue to the allottee, but it resulted in more uniformity and was more in accordance with the 1898 agreement to fix a date as of which all such payments should cease. The Agreement of 1898 contemplated early termination of the tribal government and the time for making deeds to allottees. The Act of 1903 confirmed that by fixing March 4, 1906, as the end of tribal government and the time for making deeds to allottees. In fixing June 30, 1908, as the date for ending royalty payments to the

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> tribal treasury Congress allowed the tribal treasury all that was contemplated by the original plan.

This matter has also been before the courts. In the case of *Fish v. Wise*, 52 F.2d 544 (10th Cir. 1931), *cert. denied*, 284 U.S. 688 (1932), it was stated at page 546:

> We gave careful consideration to the Seminole Agreement (30 Stat. 567) in *Moore v. Carter Oil Co.* [43 F.2d 322 (10th Cir. 1930), *cert. denied*, 282 U.S. 903 (1931)] and reached the conclusion, for the reasons there stated, that Seminole allottees acquired full equitable title to their allotments when they were made, and that thereafter when they received deeds for them, which the agreement promised and said they should have, they thus acquired, as the agreement intended they should acquire, legal title in fee to said allotment, free from any claim on the part of the tribe as such or on the part of any other member of said tribe, his heirs, or grantees; and we adhere to that conclusion. . . .

Cf. Goat v. United States, 244 U.S. 458 (1912).

Assuming arguendo that the Seminole Agreement did 126
create a vested property right in the Seminole Nation, we could not agree with plaintiff's contention that the subsequent termination of the equalization fund was in contravention of the 5th Amendment to the U.S. Constitution. The equalization fund was created for a very limited period of time. It was to end upon termination of the tribal government. At the time of the 1898 Agreement, the tribal government was to be extinguished when Oklahoma

was admitted to statehood. Thus, any property right in the Seminole Nation was subject to divestment. In the exercise of its plenary power over Indian property, Congress may decide to distribute tribal property among its members. Where the distribution is made in good faith no recovery is possible because Congress has merely transmuted one form of asset into another form. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *Three Tribes of Fort Berthold Reservation v. United States*, 182 Ct. Cl. 543; 300 F.2d 686 (1968). The 1906 Act, *supra*, and the 1908 Act, *supra*, provided for the distribution and conveyance of any communal tribal interest in one-half of the royalties to the individual Seminole allottees.

Plaintiff has contended that Sections 11 and 16 of the Curtis Act (Act of June 28, 1898, 30 Stat. 495, 497, 501) separated the surface and subsurface property interests and reserved the minerals to the tribes. However, the said provisions of the Curtis Act did not apply to Seminole Nation allotments made pursuant to the 1898 Seminole Agreement. The Curtis Act, in its application, concerned the allotment of tribal lands of those of the Five 127
Civilized Tribes which had not come to agreement with the United States. The Seminoles had reached their agreement, and the allotments were as provided by the specific terms of that agreement which made no provision for reserving subsurface mineral rights in the Seminole Nation. See *Woodward v. De Graffenried*, 238 U.S. 284 (1915); *Moore v. Carter Oil Co.*, 43 F.2d 322 (10th Cir. 1930), *cert. denied*, 282 U.S. 903 (1931).

Plaintiff has also contended that the passage of Section 11 of the 1908 Act, *supra*, was a violation of the rules of fair and honorable dealings. In its previous decision the Commission concluded that the Commissioner of Indian Affairs had actionably wronged the Seminole Nation in

securing the passage of Section 11 of the 1908 Act and that, therefore, the defendant was liable under Clause 5, Section 2 of the Indian Claims Commission for such "wrongful action . . . inconsistent with the concept of fair and honorable dealings." Upon reconsideration of the record in this case we do not believe that the actions of the Commissioner of Indian Affairs were such as to give rise to a cause of action under Clause 5, Section 2 of the Act. The evidence does not support our previous findings and conclusions of impropriety and evil intent on the part of the Commissioner. The Commissioner was in no manner involved in improper conduct, and, we are convinced, he was merely acting in a ministerial capacity to provide the means for accomplishing that which had always been intended by the 1898 Seminole Agreement. Section 11 was added to the 1908 Act for the purpose of clarifying the payment of royalties. The United States received absolutely no benefit from the 1908 Act and, as stated in 128
Fish v. Wise, supra, and *Moore v. Carter Oil, supra,* the Seminole Nation was not deprived of any property right.

We can agree with the Commission's concern expressed in the 1966 decision with respect to the secretive aspects of a congressional enactment affecting the Seminole Nation's royalty fund without the Nation's knowledge. But any such impropriety alone cannot give rise to a cause of action under Clause 5, Section 2 of the Indian Claims Commission Act. Under the facts in this case, the enactment of Section 11 of the 1908 Act did not result in the deprivation of any property right owned by the Seminole Nation, and there can be no recovery under clause 5, section 2 of the Act.

We agree with the conclusions made in the previous decision that the Dawes Commission had not acted wrongfully when it divided the Seminole allotments by value without

taking into consideration the latent value of oil deposits within some of the allotments. The Dawes Commission could not have known that any of the allotments included oil deposits. Every effort was made to provide for allotments which were equal in value. Further, any failure to allot each member a mathematically equal share would merely affect the personal property interests of the individual Seminole allottees. Such individual claims are beyond this Commission's jurisdiction, which is limited to "claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians." 25 U.S.C. §27a; see *Minnesota Chippewa Tribe v. United States*, 161 Ct. Cl. 258, 315 F.2d 906 (1963); *Cherokee Freedmen v. United States*, 161 Ct. Cl. 787 (1963). 129

We have concluded that the plaintiffs' petition should be dismissed, and we have, accordingly, vacated our previous findings and conclusions in this case and entered new findings of fact.

/s/ JEROME K. KUYKENDALL
Jerome K. Kuykendall, Chairman

I concur:

/s/ MARGARET H. PIERCE
Margaret H. Pierce, Commissioner

Yarborough, Commissioner, concurring in the result 130

If any right or interest of the Seminole Nation was taken by the 1908 Act, the deed was complete, under the terms of the Act, as of June 30, 1908. If, under the plaintiff's view of the case, tribal property was wrongfully taken, the taking was done as of June 30, 1908, and no vestige of tribal ownership or United States trust responsibility or accountability to the tribe remained thereafter in regard to this contested interest. To recover, plaintiff must prove as damages the value of the interest taken as of the date it was taken.

The value of a mineral interest could be shown by evidence of profitable production or expectation of profitable production as seen by the hypothetical purchaser in 1908. Plaintiff's only relevant evidence of mineral discovery prior to the taking date consists of references to two oil wells in the Seminole country, one completed in 1904 and one in 1908, no profitability being shown for either (Plaintiff's expert witness testified that the Seminole area's first commercial oil production was obtained in 1923). Although it is greatly to be doubted, it may be possible that a properly qualified and gifted expert witness could construct a credible opinion as to the 1908 value of the mineral interest of the whole tract from the scanty data on the two oil wells. However, there is no such opinion in the record, and altogether no evidence upon which a

1908 value finding can be based.[1] Plaintiff has proved no damages and I concur in the result reached. 131

/s/ RICHARD W. YARBOROUGH
Richard W. Yarborough, Commissioner

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Blue, Commissioner, dissenting: 132

In its opinion dated June 24, 1966, this Commission held that the defendant,

> by reason of the wrongful act of its representative, the Commissioner of Indian Affairs, is liable for actual damages suffered by the plaintiff resulting from the termination of the equalization fund, which wrongful action was inconsistent with the concept of fair and honorable dealings contained in Clause 5 of Section 2 of the Indian Claims Commission Act of 1946 (25 U.S.C. §70a).

The majority opinion is now vacating the 1966 interlocutory order and is dismissing the petition.

In my opinion the findings of fact and opinion expressed by this Commission in 1966, in this case, are proper and justified, and should not be vacated or set aside.

The 1898 Agreement between the Seminole Nation and the Dawes Commission, solemnly entered into, provided

[1] It is to be hoped that my dissenting colleagues' studied silence on the valuation evidence will raise no expectations that a different result could be reached even were their theory of liability to be accepted.

for a division of the lands among the members of the tribe, but it also contained several very important safeguards for the tribe, that may be summarized:

1. Alienation of allotted lands prior to issuance of patents was prohibited.

2. All leases by allottees required approval by the tribal chief.

3. There could be no leases for coal, minerals, coal oil, or natural gas except by the tribal government with the consent of the allottee and approval of the Secretary of the Interior.

4. Should coal or other minerals be discovered and pro- 133
duce royalties, one-half of the royalties should be paid to the allottee and the other half should be paid into the tribal treasury *until the extinguishment of the tribal government to be used for the purpose of equalizing the value of the allotments* (emphasis supplied).

5. No deed could issue to an allottee until extinguishment of the tribal government.

6. Each allottee was to designate one tract of forty acres, which was to be made inalienable and non-taxable as a homestead in perpetuity.

The above were important provisions envisioning the allottees holding separate property, but maintaining a certain portion in perpetuity. Thus the establishment of the equalization fund, to be fully administered by the tribal government. These provisions, no doubt, were insisted upon and contained in the same instrument wherein the Seminole Nation agreed to a division of its property among its members. I regard them as conditions.

As important as those conditions were, entered into by agreement, they were completely changed, not by agreement, but by unilateral Act of Congress passed in 1908, and in earlier acts, without extinguishing the tribal government and in violation of the agreement. The result was that in a few years the Seminole Indians held no land in perpetuity. In fact, many held none at all.

Congress, no doubt, had the plenary power to do what it did. But in doing so, were the actions fair and honorable? I agree with the Commission's 1966 conclusion wherein the answer was, no. I do not think that that conclusion is dependent on the nature of the motive for the exercise of the Congressional power. 134

Perhaps, as argued, the defendant received no monetary or physical benefits, but I am not at all certain that others did not do so, at the ultimate expense of the Seminole Nation and its members, due to governmental actions and in violation of the defendant's agreement.

Whether the Seminole Nation lost any compensable interterest is a matter which should be determined by further trial. The fact of the matter is that the Seminole Nation, in effect, lost everything. The Seminole Nation owned all of the land prior to the 1898 Agreement. In that agreement it agreed to divide the lands among its people, portions to be held in perpetuity, but subject to the other provisions in the agreement. The agreement was revised, unilaterally, setting the stage for all sorts of exploitation. The intent of the Seminole Nation, that its members would always own a portion of the land, so clearly set out in

the 1898 Agreement, was not protected.[1] Congressional action defeated that intent.

It is somewhat strange for the defendant, in effect, to be saying to the Seminole Nation:

"You did own the land. We agreed for you to allot 135
it among your members, partly in perpetuity, and to provide for you to make certain that all of your members would be equally treated. We could unilaterally change the provisions of that agreement, stripping you of any and all remaining power or authority, but you cannot recover because of *your* (emphasis supplied) agreement. You are bound by the agreement. We are not. You were not really harmed."

In entering into the 1898 Agreement, the Seminole Nation was acting for itself and its members, with a certain clear intent, for its members to retain the land and receive equal value, through the equalization fund. The fact is, the Seminole Nation did not cede its land in the 1898 Agreement. The 1908 Act and other acts following the 1898 Agreement unilaterally took away the vested rights of the Seminole Nation and its members. Every form of government is damaged if its people are damaged and to the extent they are damaged. This is uniquely true when the damage results from violating an agreement entered into with that government, under which agreement certain acts were taken because of the provisions that certain other actions would be maintained.

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[1] Section 8 of the Act of March 3, 1903, restricted the inalienability to the lifetime of the allottee, not exceeding 21 years from the date of the deed for the allotment. (32 Stat. 982, 1008).

The majority relies to some extent on the two Court cases: *Fish v. Wise*, 52 F.2d 544 (10th Cir. 1931), *cert. denied*, 284 U.S. 688 (1932), and *Moore v. Carter Oil Co.*, 43 F.2d 322 (10th Cir. 1930), *cert. denied*, 282 U.S. 903 (1931).

I don't think either of the above cases is applicable in 136
the case before this Commission. Both cases were decided prior to the establishment of the Indian Claims Commission.

The 1966 Commission's opinion followed an extensive inquiry; it was well reasoned and just. I do not think it should be vacated or set aside. We should proceed to consider the extent of the actual damages, if any, the Seminole Nation suffered.

/s/ BRANTLEY BLUE
Brantley Blue, Commissioner

I concur:

/s/ JOHN T. VANCE
John T. Vance, Commissioner

BEFORE THE INDIAN CLAIMS COMMISSION

* * * * *

[Decided: May 31, 1972]

PRELIMINARY STATEMENT

The Commission previously entered findings of fact in this case on June 24, 1966. Thereafter, on March 10, 1969, a hearing on the issue of damages was held before Chairman Kuykendall and then Commissioner McKeldin. At that hearing defendant presented an oral motion to dismiss, which motion was denied. Following the conclusion of the hearings on the issue of damages, defendant filed a written motion to dismiss the plaintiff's petition for failure to prove damages. The motion was subsequently denied.

The Commission has now determined, upon reconsideration of the entire record, that its previous findings of fact, opinion, and interlocutory order of June 24, 1966, should be vacated. An order to that effect being entered, the Commission now has before it the issues of defendant's liability to the plaintiff Seminole Nation arising from the alleged wrongful action of the Dawes Commission in the allotting of Seminole land, and the actions of the United

States in terminating the interest of the Seminole Nation 138
in an "equalization fund" to be financed by one-half of all oil or mineral royalties accruing to the allotments.

FINDINGS OF FACT

The Commission makes the following findings of fact:

1. This suit was timely filed on August 6, 1951, by the Seminole Nation (of Oklahoma), an Indian tribe or other identifiable group of American Indians residing within the territorial limits of the United States within the contemplation of Section 2 of the Indian Claims Commission Act of 1946 (60 Stat. 1049, 1050). The instant plaintiffs have heretofore been found to have the capacity to maintain suits before this Commission. *Seminole Nation v. United States*, 10 Ind. Cl. Comm. 450, 461 (1962).

2. The Seminole Nation was one of the Five Civilized Tribes, all of which were removed from their aboriginal lands in the eastern part of the United States to lands purchased and set apart for them in Indian territory, in what is now the State of Oklahoma. The Seminole Nation acquired its lands pursuant to the provisions of Article 3 of the Treaty of March 21, 1866 (14 Stat. 755), and the Act of August 5, 1882 (22 Stat. 265). Previously, the United States had agreed that the Seminole lands would never be included in any territory or state, and the Seminoles would be "secured in the unrestricted right of self-government, and full jurisdiction over persons and property, within their . . . limits" (Article 15, Treaty of August 7, 1856, 11 Stat. 699, 703-704).

3. In 1893 the United States found it necessary to 139
change its policy of isolating the Five Civilized Tribes in

Indian Territory. It was determined that the tribal governments should be extinguished and that the Indian Territory should be subjected to the laws of the State of Oklahoma upon the admission of that state to the union. By section 15 of the Act of March 3, 1893 (27 Stat. 612, 645), the United States, in an effort to encourage the Five Civilized Tribes to voluntarily end their communal system of land ownership, gave its consent

> . . . to the allotment of lands in severalty not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws, and [S]eminoles; and upon such allotments the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States . . . . and upon the allotment to the lands held by said tribes respectively the reversionary interest of the United States therein shall be relinquished and shall cease.

By section 16 of the same Act provision was made for the appointment of a commission to enter into negotiations with each of the Five Civilized Tribes

> . . . for the purpose of the extinguishment of the national or tribal title to any lands within that territory now held by any and all of such nations or tribes, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively, as may be entitled to the same, or by such other method as may be agreed upon between the several nations and tribes

> aforesaid, or each of them, with the United States, with a view to such and [sic] adjustment, upon the basis of justice and equity, as may, with the consent of such nations or tribes 140
> of Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said India[n] Territory.

This was the origin of the Commission to the Five Civilized Tribes, familiarly known as the Dawes Commission.

4. After three years of unfruitful negotiation, Congress directed the Dawes Commission to begin formulating citizenship rolls, preliminary to mandatory allotment (§1 of the Act of June 10, 1896, 29 Stat. 321, 339). The Dawes Commission and the Seminole Nation's negotiating committee entered into serious discussion, and, on December 16, 1897, an agreement was signed. That agreement was ratified by the Seminole General Counsel on December 29, 1897, and approved by Congress without amendment by the Act of July 1, 1898 (30 Stat. 567). The Seminole Agreement provided:

> All lands belonging to the Seminole tribe of Indians shall be divided into three classes, designated as first, second, and third class; the first class to be appraised at five dollars, the second class at two dollars and fifty cents, and the third class at one dollar and twenty-five cents per acre, and the same shall be divided among the members of the tribe so that each shall have an equal share thereof in value, so far as may be, the location and fertility of the soil considered; giving to each the right to select his allotment so as to

include any improvements thereon, owned by him at the time; and each allottee shall have the sole right of occupancy of the land so allotted to him, during the existence of the present tribal government, and until the members of said tribe shall have become citizens of the United States. Such allotments shall be made under the direction and supervision of the Commission to the Five Civilized Tribes in connection with a representative appointed by the tribal government; and the chairman of said Commission shall execute and deliver to each allottee a certificate describing therein the land allotted to him.

Any allottee may lease his allotment for any period not exceeding six years, the contract therefor to be executed in triplicate upon printed blanks provided by the tribal government, and before the same shall become effective it shall be approved by the principal chief and a copy filed in the office of the clerk of the United States court at Wewoka. 141

No lease of any coal, mineral, coal oil, or natural gas within said Nation shall be valid unless made with the tribal government, by and with the consent of the allottee and approved by the Secretary of the Interior.

Should there be discovered on any allotment any coal, mineral, coal oil, or natural gas, and the same should be operated, so as to produce royalty, one-half of such royalty shall be paid to such allottee and the remaining half into the tribal treasury until extinguishment of tribal government, and the latter shall be used for the

> purpose of equalizing the value of allotments; and if the same be insufficient therefor, any other funds belonging to the tribe, upon extinguishment of tribal government, may be used for such purpose, so that each allotment may be made equal in value as aforesaid.

Since it was then anticipated that the Seminole tribal government would be terminated shortly, the agreement stipulated that the allottees should receive their deeds from the principal chief "[w]hen the tribal government shall cease to exist." Such deed would convey

> . . . all the right, title, and interest of the said Nation and the members thereof in and to the lands so allotted . . .; and the acceptance of such deed by the allottee shall be a relinquishment of his title to and interest in all other lands belonging to the tribe, except such as may have been excepted from allotment and held in common for other purpose. (*Id.* at 568)

5. The Act of March 3, 1903 (32 Stat. 982, 1008), provided that the Seminole tribal government should not continue past March 4, 1906. However, before that date 142
was reached, Congress extended, with certain limitations, the tribal governments of the Five Civilized Tribes, including the Seminole Nation (Joint Resolution of March 2, 1906, 34 Stat. 822; Act of April 26, 1906, 34 Stat. 137, 148). Congress also provided in Section 6 the Act of April 26, 1906 (34 Stat. 137, 139), for the execution of deeds to allottees "prior to the time when the Seminole government shall cease to exist."

6. The Seminole equalization fund, which had been created by the Seminole Agreement of 1898, was abolished

pursuant to §11 of the Act of May 27, 1908 (35 Stat. 312, 316), which reads as follows:

> That all royalties arising on and after July first, nineteen hundred and eight, from mineral leases of allotted Seminole lands heretofore or hereafter made, which are subject to the supervision of the Secretary of the Interior, shall be paid to the United States Indian agent, Union Agency, for the benefit of the Indian lessor or his proper representative to whom such royalties shall thereafter belong; and no such lease shall be made after said date except with the allottee or owner of the land: *Provided,* That the interest of the Seminole Nation in leases or royalties arising thereunder on all allotted lands shall cease on June thirtieth, nineteen hundred and eight.

CONCLUSIONS

7. The Commission, having considered all the evidence of record and the briefs and arguments of the parties and for the reasons set forth in the opinion this date entered herein, finds and concludes that the creation of the Seminole equalization fund pursuant to the Seminole Agreement of 1895 did not create or vest any compensable property interest in the Seminole Nation. Hence the subsequent termination of the Seminole equalization fund 143
pursuant to the Act of May 27, 1908, *supra*, did not divest the plaintiff Seminole Nation of any property right on which an action for compensation may be maintained.

8. The Commission further finds and concludes that there was nothing in the actions of the United States of any of its officials in connection with the passage of the

1908 Act which could give rise to a cause of action under Clause 5, Section 2 of the Indian Claims Commission Act.

9. The Commission further finds and concludes that the Dawes Commission did not act wrongfully in its division of the Seminole land allotments by value.

10. Finally, the Commission concludes that the petition brought by the Seminole Nation in the matter of Docket No. 204 should be dismissed.

/s/ JEROME K. KUYKENDALL
Jerome K. Kuykendall, Chairman

/s/ RICHARD W. YARBOROUGH
Richard W. Yarborough, Commissioner

/s/ MARGARET H. PIERCE
Margaret H. Pierce, Commissioner

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28 Ind. Cl. Comm. 117, 144

BEFORE THE INDIAN CLAIMS COMMISSION

* * * * *

ORDER VACATING COMMISSION'S FINDINGS OF FACT, OPINION, AND INTERLOCUTORY ORDER

Upon reconsideration of the entire record in the above matter, and for the reasons set forth in the opinion this date entered herein, the Commission, on its own motion, has determined that the findings of fact, opinion, and interlocutory order previously entered herein on June 24, 1966 (17 Ind. Cl. Comm. 67), should be vacated and set aside.

IT IS THEREFORE ORDERED that the Commission's findings of fact, opinion, and interlocutory order of June 24, 1966, are hereby vacated and set aside.

Dated at Washington, D.C., this 31st day of May, 1972.

/s/ JEROME K. KUYKENDALL
Jerome K. Kuykendall, Chairman

/s/ RICHARD W. YARBOROUGH
Richard W. Yarborough, Commissioner

/s/ MARGARET H. PIERCE
Margaret H. Pierce, Commissioner

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28 Ind. Cl. Comm. 117, 145

BEFORE THE INDIAN CLAIMS COMMISSION

* * * * *

ORDER DISMISSING PETITION

Upon the findings of fact, conclusions of law, and opinion this day filed herein, which are hereby made a part of this order,

IT IS ORDERED that the petition in the above entitled case be, and the same is hereby, dismissed.

Dated at Washington, D.C., this 31st day of May, 1972.

/s/ JEROME K. KUYKENDALL
Jerome K. Kuykendall, Chairman

/s/ RICHARD W. YARBOROUGH
Richard W. Yarborough, Commissioner

/s/ MARGARET H. PIERCE
Margaret H. Pierce, Commissioner

. . . . . .

29 Ind. Cl. Comm. 421

BEFORE THE INDIAN CLAIMS COMMISSION

* * * * *

ORDER DENYING PLAINTIFF'S MOTION FOR REHEARING

UPON CONSIDERATION of the plaintiff's motion as captioned above, filed herein on June 28, 1972, the defendant's response in opposition thereto, filed herein on July 27, 1972, the plaintiff's reply filed on August 3, 1972, and the arguments of counsel at the hearing herein on January 9, 1973, the Commission has concluded that (1) the plaintiff has failed to state any valid grounds under the Commission's Rules of Procedure upon which said motion should be granted, and (2) the Commission's findings of fact and conclusions of law entered herein on May 31, 1972, 28 Ind. Cl. Comm. 117, are supported by a preponderance of the evidence and are in accord with applicable law.

IT IS THEREFORE ORDERED that the plaintiff's motion for rehearing be, and the same is hereby, denied.

Dated at Washington, D.C., this 26th day of January, 1973.

/s/ JEROME K. KUYKENDALL
Jerome K. Kuykendall, Chairman

/s/ RICHARD W. YARBOROUGH
Richard W. Yarborough, Commissioner

/s/ MARGARET H. PIERCE
Margaret H. Pierce, Commissioner

Blue, Commissioner, dissenting.

I dissent for the same reasons stated in my dissenting opinion to the decision in this case, filed May 31, 1972, 28 Ind. Cl. Comm. 117, 132 (1972).

/s/ BRANTLEY BLUE
Brantley Blue, Commissioner

I concur:

/s/ JOHN T. VANCE
John T. Vance, Commissioner

APPENDIX C

17 Ind. Cl. Comm. 67-96

BEFORE THE INDIAN CLAIMS COMMISSION 67

* * * * *

[Decided: June 24, 1966]

FINDINGS OF FACT

The Indian Claims Commission makes the following findings of fact:

1. The suit at bar was timely filed on August 6, 1951, by the Seminole Nation (of Oklahoma), an Indian tribe or other identifiable group of American Indians residing within the territorial limits of the United States within the contemplation of Section 2 of the Indian Claims Commission Act of 1946 (25 U.S.C. §70a).

The instant plaintiff has heretofore been found to have the capacity to maintain suits before this Commission *(Seminole Nation v. United States,* 10 Ind. Cl. Comm. 450, 461 (1962)) and it does not yet appear that the instant claim is an aggregation of wrongs suffered by individuals.

2. The plaintiff's two causes of action are contained in allegations that the Dawes Commission erred actionably in dividing Seminole land allotments by value without taking into consideration the value of oil deposits within some 68
of the allotments and that the defendant generally failed to meet the standard of fair and honorable dealings when it unilaterally terminated the interest of the Seminole Nation in an equalization fund financed by one-half of all oil royalties paid.

3. By the Curtis Act (30 Stat. 495) Congress instructed the Dawes Commission to reach an agreement with each of the Five Civilized Tribes (Seminoles, Creeks, Cherokees, Chickasaws, and Choctaws) regarding allotment of tribal lands. The agreement with the Seminoles, popularly known as the Original Seminole Agreement (30 Stat. 567), was dated December 16, 1897, ratified by the Seminole Council on December 20, 1897, and ratified by Congress on July 1, 1898.

Under this agreement tribal lands were to be divided into three classes valued at $5.00, $2.50, or $1.25 per share. Each Seminole Indian would receive an equal share. Equality was to be measured by value rather than by quantity. The Original Seminole Agreement contemplated some disparity between allotment values and contained a provision to rectify the situation (30 Stat. 567):

> Should there be discovered on any allotment any coal, mineral, coal oil, or natural gas, and the same should be operated so as to produce royalty, one-half of such royalty shall be paid to such allottee and the remaining half into the tribal treasury until extinguishment of tribal government, and the latter shall be used for the purpose of equalizing the value of allotments; and if the same be insufficient therefor, any other funds belonging to the tribe, upon extinguishment of tribal government, may be used for such purpose, so that each allotment may be made equal in value as aforesaid.

This solution was substantially consonant with Sections 11 and 16 of the Curtis Act (30 Stat. 495, 497, 501) relating to mineral leases.

4. Royce Area No. 481 on Plate 3, Royce Map of Oklahoma, is the Seminole reservation in Indian Territory and it is less than one hundred miles south-southwest of Bartlesville, Oklahoma, which was the site of a major oil discovery early in the 20th Century. Between Bartlesville and the Seminole reservation, just about midway on a straight line, was the Pawnee County oil development. 69

In 1906, the Governor of Oklahoma reported to the Secretary of the Interior:

> The developments in the Cleveland, Pawnee County, oil field, show a marked failing off for the year just ended, as compared with the intense activity of the two previous years.

The Annual Report of the Secretary of the Interior for 1906 shows oil and gas development in Creek and Cherokee lands of the Indian Territory. The annual reports of the Commissioner of Indian Affairs for 1908 and earlier are replete with data on oil and gas development in the lands of all of the Five Civilized Tribes.

On the evidence adduced in the case at bar, the Dawes Commission could not have known that any Seminole land allotments included oil deposits and no onus can be assigned to the defendant by reason of its creature, the Dawes Commission, not considering all deposits in setting up the allotment classifications by value.

5. An act of Congress was passed to remove restrictions from part of the lands of allottees of the Five Civilized Tribes (35 Stat. 312) and as approved by the President on May 27, 1908, Section 11 thereof pertained to oil royalties (*id.*, p. 316):

> Sec. 11. That all royalties arising on and after July first, Nineteen Hundred and Eight, from mineral leases of allotted Seminole lands heretofore or hereafter made, which are subject to the supervision of the Secretary of the Interior, shall be paid to the United States Indian Agent, Union Agency, for the benefit of the Indian lessor or his proper representative to whom such royalties shall thereafter belong; and no such lease shall be made after said date except with the allottee or owner of the land: *Provided*, That the interest of the Seminole Nation in leases or royalties arising thereunder on all allotted lands shall cease on June thirtieth, Nineteen Hundred and Eight. 70

The proviso to the said Section 11, quoted last above, was the legislative act which terminated the interest of the Seminole Nation in the fund-of-one-half-of-the-royalties which the Seminole Nation was going to use to equalize the value of the several Seminole land allotments.

6. The act of Congress mentioned in Finding No. 5 hereof (*supra*) was introduced into the House of Representatives in the first session of the 60th Congress and assigned Bill No. H.R. 15641. Hearings were held on that and several other bills intended to accomplish the same purpose, *i.e.*, removal of restrictions from land allotments of the Five Civilized Tribes. As drafted and introduced, neither H.R. 15641 nor any of the other bills on the same subject contained any language alluding to Seminole allotments or to mineral leases of allotted Seminole lands, nor did the bills contain any reference whatsoever to the Seminole Nation's fund-of-one-half-of-the-royalties.

The House Committee on Indian Affairs held extensive hearings at which numerous Indians' representatives testified. No one testified for the Seminole Nation but a letter from its Chief, John F. Brown, was read into the record. 71 The letter from Chief Brown contained no suggestion of knowledge that the Seminole Nation's fund-of-one-half-of-the-royalties was to be considered, and it was not considered by the House Committee on Indian Affairs.

When H.R. 15641 was reported out with amendments, it still contained only nine sections and nothing pertaining to mineral leases of allotted Seminole lands. That situation remained unchanged as the House passed the bill and sent it to the Senate. House passage of the bill was preceded by testimony from Oklahoma Congressmen and from spokesmen for the Department of the Interior, attesting that Indians, whites, the Oklahoma Congressional delegation, the Department of the Interior, and the Commissioner of Indian Affairs were fully in accord with the bill.

7. The Senate Committee on Indian Affairs reported out H.R. 15641 with numerous recommended amendments, including the addition of recommended new sections numbered 10, 11, and 12 (Senate Amendment Nos. 36, 37, and 38, respectively). Amendment No. 38 contained the following language:

> The next amendment was, on page 10, after line 16, to insert as a new section the following:
>
> Sec. 12***
>
> And all royalties heretofore accrued or hereafter arising from mineral leases by Seminole allottees heretofore or hereafter made shall be paid to the United States Indian Agent, Union Agency, for the benefit of the Indian lessor or

> his proper representative to whom such royalties shall hereafter belong; and all royalties accrued or hereafter accruing under any oil lease made under Section 13 of the Act of Congress approved January 28, 1898, entitled "An act for the protection of the people of Indian 72
> Territory, and for other purposes," shall be paid to allottees of the land included in such lease pro rata according to the respective holdings, or to their lawful assigns.

The Senate Committeee on Indian Affairs did not recommend, or mention, anything in the nature of the proviso now being traced (*supra,* Finding No. 5). The bill was reported to the Senate as amended, and the amendments were concurred in.

8. Since the House and Senate versions of H.R. 15641 differed, conferees were appointed by both Houses to resolve the differences. When the conferees of the House of Representatives reported back that the differences had been resolved ". . . after full and free conference . . .," it was said that the Senate receded from its Amendment No. 36 which proposed to add a new section numbered 10. This concession on the part of the Senate had the effect of utterly eliminating the proposed Section 10 from the bill, H.R. 15641.

The House conferees also reported back that the House receded from its disagreement to the amendment of the Senate numbered 38, but with an amendment to strike the proposed Section 12 in its entirety and substitute the following:

> Sec. 12. That all royalties arising on and after July 1st, Nineteen Hundred and Eight,

> from mineral leases of allotted Seminole lands heretofore or hereafter made, which are subject to the supervision of the Secretary of the Interior, shall be paid to the United States Indian Agent, Union Agency, for the benefit of the Indian lessor or his proper representative,[1] to whom such royalties shall thereafter belong; and 73
> no such lease shall be made after said date except with the allottee or owner of the land: *Provided,* That the interest of the Seminole Nation in leases or royalties arising thereunder on all allotted lands shall cease on June thirtieth, Nineteen Hundred and Eight.

The explanation tendered to the House of Representatives anent Senate Amendment No. 38 was:

> . . . The main changes are as follows. . . . Another provision provides for the disposal of the moneys arising from the rental of mineral lands in the Seminole Indian Reservation for the benefit of the Seminole Indians. . . .

While the explanation tendered to the Senate was:

> Amendment No. 38 provides for the disposal of the moneys received as royalties under mineral leases of the lands in the Seminole Nation.

Neither House was informed of the effect of the proviso upon the Seminole Nation's fund-of-one-half-of-the-royalties. No minutes of the House-Senate conference being available, it is not possible to identify the Representative or Senator who advanced the termination proviso, or to determine the motive behind it.

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[1] See note in opinion.

9. The bill was passed without material discussion and without any debate whatsoever on the proviso, no Congressman claiming credit for it.

In his 1908 report to the Secretary of the Interior, the Commissioner of Indian Affairs claimed the credit, saying:

> The agreement with the Seminole Nation, ratified by Congress on July 1, 1898 . . . provided that of all royalties produced from allotted lands in that tribe, one-half shall be paid to the allottee and the remaining half into the tribal treasury until the extinguishment of the tribal government. This differed from the rule in force in the other four nations [Creeks, Cherokees, Choctaws, and Chickasaws], where allottees received all the royalties. So on the department's recommendation the following clause was inserted in the "restrictions" act: 74
>
> > Sec. 11. That all royalties arising on and after July 1, 1908, from mineral leases of allotted Seminole lands heretofore or hereafter made, which are subject to the supervision of the Secretary of the Interior, shall be paid to the United States Indian Agent, Union Agency, for the benefit of the Indian lessor or his proper representative to whom such royalties shall thereafter belong;***

The material omitted, and so indicated in the Commissioner's report, hints that the Commissioner of Indian Affairs advanced the entire Section 11 with proviso and this Commission so finds. The fact that the Secretary of the Interior signed the letter and memorandum of May 16, 1908, recommending the proviso with an explanation that could only be characterized as specious does not absolve the

Commissioner of Indian Affairs. Further, the Commissioner of Indian Affairs did not advance the entire Section 11 as whole before the Senate Committee on Indian Affairs, but offered the proviso separately and surreptitiously at a stage in the proceedings where no minutes were being maintained and where consequent debate was unlikely. And finally, the section and proviso were apparently offered as a mere correction of a minor inconsistency and not as a major and far-reaching unilateral change in an existing agreement of treaty stature.

10. This Commission concludes that the Commissioner of Indian Affairs must bear the onus for the sequence of events set out above and in the concurrent Opinion this 75
day issued, and that the defendant is ultimately responsible for the actions of its servant, the Commissioner of Indian Affairs. The acts of the Commissioner of Indian Affairs which underly the liability include the sequential offering of Section 11 and its proviso upon occasions when the Seminole Nation would be least able to counteract the offer; failure to afford the Seminole Nation any opportunity to be heard on the subject; and misrepresentation of the measure as a mere correction of a minor inconsistency. These acts were inconsistent with the concept of fair and honorable dealings contemplated by Clause 5 of Section 2 of the Indian Claims Commission Act of 1946.

/s/ Arthur V. Watkins
Chief Commissioner

Wm. M. Holt
Associate Commissioner

T. Harold Scott
Associate Commissioner

17 Ind. Cl. Comm. 76-96

BEFORE THE INDIAN CLAIMS COMMISSION 76

* * * * *

[Decided: June 24, 1966]

Appearances:

Roy St. Lewis and Paul M. Niebell, Attorneys for the Seminole Nation [of Oklahoma]

Clifford R. Stearns, with whom was Mr. Assistant Attorney General Edwin L. Weisl, Jr., Attorneys for Defendant.

OPINION OF THE COMMISSION

Holt, Associate Commissioner, delivered the opinion of the Commission.

On August 6, 1951, the plaintiff timely filed a petition in the above-entitled suit which was duly assigned Docket No. 204. The defendant's answer was filed on June 13, 1957. The defendant filed a motion to dismiss the claim on the ground that there was a failure of cause of action and at the hearing on the motion, the additional ground of failure of evidence to support the claim was included. Rather than treat the motion, as amplified, as a motion for summary judgment, the Commission with concurrence of counsel elected to accept trial of the case on its merits.

In brief, the plaintiff contends that under the Original 77
Seminole Agreement – that is, the agreement made between the Dawes Commission and the Seminole Nation of Indians [of Oklahoma] on December 16, 1897 – which was ratified by Congress on July 1, 1898 (30 Stat. 567), the defendant promised that one-half of all coal, mineral,

coal oil, and natural gas royalties derived from exploitation of lands belonging to the Seminole Nation would be deposited in the tribal treasury. The plaintiff further contends that by Section 11 of the Act of May 27, 1908 (35 Stat. 312, 316), the defendant decided to stop depositing half of all such royalties in the tribal treasury, and in fact did stop as of June 30, 1908.

The defendant contends that Congress had the power to make the complained-of change, in keeping with the policy of dissolving tribal governments and disbursing the assets among the individual members of the tribe.

In the transcript of the hearing on the defendant's motion to dismiss the following discussions occurred:

> CHIEF COMMISSONER WATKINS: It also involves, then, the question whether the United States could, by legislation, practically set aside that agreement?
>
> MR. NIEBELL: That is right.
>
> CHIEF COMMISSIONER WATKINS: That is a law question.
>
> MR. NIEBELL: That is your law question, yes.
>
> * * *
>
> COMMISSIONER HOLT: You say that is a legal question, and I am taking this from your reply, as to whether or not that was fair and honorable? 78
>
> MR. NIEBELL: That is right; it comes right down to that.
>
> CHIEF COMMISSIONER WATKINS: That, of course, goes to the point of whether or not Congress, in passing that act, was unfair and dishonorable.

MR. NIEBELL: That is right.

The Commission decided to reserve ruling on the defendant's motion and try the case on the merits.

As the plaintiff's case developed, it was contended that the defendant, despite the intent of the Original Seminole Agreement of July 1, 1898 *(supra)* to confer upon Seminoles allotments equal in value, conferred allotments which were unequal in value, giving the most productive lands ". . . to the few allottees, as against the whole nation." It was further contended that the unequal distribution was actionable because it was done in the teeth of a committment to assure that half of the royalties would be reserved to the Nation, as an entity, for the benefit of all Seminoles. The plaintiff contended that there was a taking by the United States, in the sense of a divestment of tribal interest, even though the royalties remained in the hands of some Seminoles and did not pass into the Treasury of the United States.

The defendant's position, developed in argument during the trial was stated:

> COMMISSIONER SCOTT: Do you mean by that, 79
> that regardless of whether Congress might have been right, or whether it might have been wrong, there is enough here in the record to show that at least it was their intent to do right? Is that what you mean?
>
> MR. STEARNS: You have put it very neatly. That is exactly what I mean.
>
> The intent here was to try to follow a policy which would be best for the Seminole Indians.

That is what they were trying to do, and the whole series of enactments, when compared chronologically, so indicate.

This Commission has heretofore had occasion to discuss the Original Seminole Agreement in some detail. *Seminole Nation v. United States* (Docket No. 152), 10 Ind. Cl. Comm. 450, 461 (1962). For convenience, we now quote Finding No. 13 of that decision (*id.*, pp. 458, 459):

> 13. By the Curtis Act (30 Stat. 495) Congress instructed the Dawes Commission to reach an agreement with each of the Five Civilized Tribes regarding allotment of tribal lands. The agreement with the Seminoles, known as the Original Seminole Agreement (30 Stat. 567), was dated December 16, 1897, ratified by the Seminole Council on December 20, 1897, and ratified by Congress on July 1, 1898. Under this agreement tribal lands were to be dividied into three classes valued at $5.00, $2.50, or $1.25 per share. Each Seminole Indian – both freedmen and natives – would receive an equal share. Equality was to be measured by value rather than by quantity. The Original Seminole Agreement also provided that all tribal funds, after the deduction of certain items, would be divided among the Seminoles in three equal per capita installments.
>
> When the land allocations were to be made, title was to be conveyed to the individual allottees by the principal chief last elected, under his hand and the seal of the Seminole Nation. Upon approval of the deed by the Secretary of the Interior, the deed was to operate as a

relinquishment of the right, title, and interest of the United States in and to the land conveyed and as a guarantee by the United States of the title to the land conveyed.

A Seminole Supplemental Agreement (31 Stat. 250) was negotiated between the Seminole Nation and the Dawes Commission and approved by Congress on June 2, 1900. The supplemental agreement authorized the inclusion on the Seminole rolls of citizenship of children born to Seminole citizens to December 31, 1899. It specified that the allotment of lands and money would be made to the Seminole Indians on the final roll and to no other persons. 80

The final roll was approved by the Secretary of the Interior on April 5, 1901. A supplemental roll to encompass newborn children was prepared and approved. These rolls showed 2,121 "native" Seminole citizens, 21 Seminole citizens by adoption, and 986 Seminole freedmen. Five individuals were added under a 1914 act (38 Stat. 582), making a total of 3,133 Seminole citizens sharing in the allotment.

The Curtis Act *(supra)* authorizing the Dawes Commission to negotiate agreements with The Five Civilized Tribes provided in Section 11 thereof (30 Stat. 495, 497) that:

> . . .; but all oil, coal, asphalt, and mineral deposits in the lands of any tribe are reserved to such tribe, and no allotment of such lands shall carry the title to such oil, coal, asphalt, or mineral deposits;

Further, Section 16 thereof (30 Stat. 495, 501) provided that:

> Sec. 16. That it shall be unlawful for any person, after passage of this Act, except as hereinafter provided, to claim, demand, or receive, for his own use or for the use of anyone else, any royalty on oil, coal, asphalt, or other mineral . . . or for anyone to pay to any individual any such royalty or rents or any consideration therefor whatsoever; and all royalties and rents hereafter payable to the tribe shall be paid, under such rules and regulations as may be prescribed by the Secretary of the Interior, into the Treasury of the United States to the credit of the tribe to which they belong;***

Consonant with this Congressional mandate, the Original Seminole Agreement *(supra)* contained restrictions on mineral leases (30 Stat. 567):

> No lease of any coal, mineral, coal oil, or natural gas within said [Seminole] Nation shall be valid unless made with the tribal government, by and with the consent of the allottee and approved by the Secretary of the Interior. 81
>
> Should there be discovered on any allotment any coal, mineral, coal oil, or natural gas, and the same should be operated so as to produce royalty, one-half of such royalty shall be paid to such allottee and the remaining half into the tribal treasury until extinguishment of tribal government, and the latter shall be used for the purpose of equalizing the value of allotments; and if the same be insufficient therefor, any other funds belonging to the tribe, upon

> extinguishment of tribal government, maybe used for such purpose, so that each allotment may be made equal in value as aforesaid.

Counsel for the defendant was of the impression that when Congress alluded to "oil, coal, asphalt, and mineral deposits," it had collectively in mind leases of minerals and not oil. On the other hand, counsel for the plaintiff was of the impression that oil had been discovered in 1901 – only three years after the Curtis Act of June 28, 1898 – in Bartlesville. Royce Area No. 481 on Plate 3, Royce Map of Oklahoma, is the Seminoles' land and it is less than a hundred miles south-southwest of Bartlesville. In 1906, the Governor of Oklahoma reported to the Secretary of the Interior:

> The developments in the Cleveland, Pawnee County (about 50 miles south-southwest of Bartlesville) oil field, show a marked falling off for the year just ended, as compared with the intense activity of the two previous years.

The Annual Report of the Secretary of the Interior for 1906, shows oil and gas development in Creek and Cherokee lands of the Indian Territory. That portion of the record in this case pertaining to the annual reports of the Commissioner of Indian Affairs is replete with data on oil and gas development in the lands of the Five Civilized Tribes, including the Seminoles, but only for 1908 and later.

It has been demonstrated that, on the record of this 82
case, the Dawes Commission could not have known that some allotments were rich in oil deposits. It follows that the Dawes Commission was not influenced in any way to consider oil deposits in setting up the allotment classifications by value.

The remaining question, and the central issue of this suit, is whether the defendant by terminating the Seminole Nation's fund-of-one-half-of-the-royalties dealt unfairly or dishonorably with the Seminole Nation as an entity within the contemplation of Clause 5 of Section 2 of the Indian Claims Commission Act of 1946 (25 U.S.C. §70a). If an actionable wrong was committed, the potential damages would be obvious since the fund was established to further equalize disparities between the value of various allotments, with any residue to be divided among enrolled Seminoles per capita. It could easily be assumed, arguendo, that if the fund were insufficient to equalize disparities between the value of various allotments, the Seminole Nation would have had to make up the equalization payments out of other assets of the Seminole Nation. Whether the fund was deficient and whether the Seminole Nation made up the difference out of other assets are open questions at this stage of this case, since it must be emphasized that neither this aspect of potential damages or any other theory of recovery or of computation of damages has been urged by the plaintiff to date. Hence, this Commission must proceed on the assumption that if a justiciable controversy exists, the plaintiff will undertake to establish a 83
viable theory of recovery and measure of damages at some future date.

The gravamen of this case is the proviso to Section 11 of the Act of May 27, 1908 (35 Stat. 312, 316) which provided:

> Sec. 11. That all royalties arising on and after July first, Nineteen Hundred and Eight, from mineral leases of allotted Seminole lands heretofore or hereafter made, which are subject to the supervision of the Secretary of the Interior, shall be paid to the United States Indian

> Agent, Union Agency, for the benefit of the Indian lessor or his proper representative to whom such royalties shall thereafter belong; and no such lease shall be made after said date except with the allottee or owner of the land: *Provided*, That the interest of the Seminole Nation in leases or royalties arising thereunder on all allotted lands shall cease on June thirtieth, Nineteen Hundred and Eight.

The proviso, quoted last above, was the legislative act which terminated the interest of the Seminole Nation in the fund-of-one-half-of-royalties.

Both parties have submitted fragments of the legislative history of the Bill numbered H.R. 15641 (60th, 1st) which contained the disputed Section 11 of the Act of May 27, 1908. Neither party contends that the submission is complete, and if this Commission is to have any adequate understanding of the Act which is the gravamen of this case, it must look outside of the record.

Quite a few bills were introduced into the first session of the Sixtieth Congress on the subject of removing the restrictions on the power of alienation of the property of the Five Civilized Tribes. Of these, H.R. 12900, 14402, 15831, 16495, 16962, and S. 3814, 4644, 5586, and 6794 were all referred to the Houses' respective Committees on Indian Affairs and there died, while S. 6220 and 6221 on 84
the same subject were referred to the Senate Committee on Indian Affairs, reported out adversely, and postponed indefinitely. But H.R. 15641 on the same subject became P.L. 140 (60th, 1st) when it was approved on May 27, 1908. The tortuous history of H.R. 15641 and particularly of its Section 11 reads almost like a mystery story, a mystery which is little aided by the plaintiff's account of what

happened or by the defendant's attempted correction of that account. In following the story, it should be remembered that all four-digit page citations are from Volume 42 of the Congressional Record.

H.R. 15641 as originally drafted and referred to Committee contained nine sections. No section, and no part or parts of any of the nine sections, contained any concept even remotely resembling Section 11 *(supra)* or the proviso thereto *(supra)*. The subcommittee met first on Tuesday, February 25, 1908, to hear witnesses for and against the proposed measures. It is not surprising that of the numerous individuals who testified on behalf of Indian factions, not one Seminole spokesman was numbered for the Seminoles or their lands and leases were not mentioned in the original draft at all. There was then no reason why the Seminoles in particular should have been alert to this proposed legislation, and apparently in fact they were not.

The Indians' representatives who testified were concerned with provisions of the bill as drafted. They were concerned that Congress proposed to subject to local taxation 85
Indian allotments freed of restrictions on alienation. They were concerned that full-blooded Indians who knew little of the ways of the world would be expected to manage their own affairs prudently. They were concerned that possible enrollment irregularities might become irreparable. They were concerned that the interests of minors might not be safeguarded. But they were not visibly concerned with elimination of the Seminole Nation's fund-of-one-half-of-the-royalties because that concept comprised no part of the matters under consideration. There was testimony by representatives of the Department of the Interior. The then Assistant Attorney General of that Department expressed considerable satisfaction with the

bill "as it stands," probably for reasons which will become apparent as this examination proceeds. Mr. Ward, an attorney employed by the Department of the Interior, did mention the Seminole Indians in passing, but not directly or tangentially in context of the issue which is central to the suit at bar. Mr. Zevely, who as representative of the Mid-Continental Oil and Gas Producers' Association, of Tulsa, Oklahoma, might have been expected to have some thoughts on royalty payments, did not mention the Seminole Nation's fund-of-one-half-of-the-royalties and generated no discussion of it. Oklahoma's Congressmen, Representatives Devenport and Ferris, failed to bring up the vexations issue of the fund-of-one-half-of-the-royalties, but the latter did deem it desirable to expound at length on the remarkable accord reached on H.R. 15641:

> . . . The Oklahoma delegation, consisting of five 86
> Members of the House and two Senators, began at the beginning of this Congress to try and procure some legislation that would relieve the conditions in Oklahoma.
>
> Having in mind the wide experience and knowledge that the Department had, we at once began a series of consultations with the Interior Department and the Indian Office; and I might say that those meetings were all well attended and careful attention was paid in every particular to what was said and done, and I might say that perhaps the Department yielded some. I am sure the delegation yielded a good deal. The result of day after day and meeting after meeting in those conferences, attended by members of the Indian Office, by the Secretary himself, by attorneys of the Indian Office and attorneys of the Interior Department, and by five Members of Congress from

> Oklahoma and two United States Senators from Oklahoma, comprising the whole delegation, was that we came to an agreement on H.R. 15641, introduced by Mr. McGuire on January 29, 1908.
>
> * * *
>
> But as the result of those conferences and as the result of a unanimous and positive agreement by the Indian Office, by the Interior Department, and by every Representative from the State of Oklahoma, including the United States Senators, we agreed upon this bill.

When Chief Moty Tiger of the Creek Nation testified for the second time, on Saturday, March 21, 1908, he stated inter alia:

> CHIEF TIGER: A Drowning man will even grasp at a straw, and I wrote to my brother, John Brown, the Seminole Chief, and he answered me, and I would like to have his answer read at this time . . . and I would like to have this incorporated in the report of the committee, if it be proper.

The letter of March 18, 1908, from John F. Brown, Chief of the Seminole Nation, follows in its entirety:

> Dear Friend and Brother: I beg to acknowledge receipt of yours of the 14th instant, just received. I greatly appreciate the gravity of the situation and the strenuous efforts being put forth by the Oklahoma delegation in Congress for the removal of restrictions on Indian lands, in which those of Indian blood are the most active, if that be possible, but I hope they will be compelled to accept much less than they

87

would like. I have lately supplemented my efforts made in Washington before the Department with letters to Secretary Garfield and Senator Curtis, and have satisfactory acknowledgments. I am assured that my representations will be made known to the committee in charge of the matter, before whom I felt sure my ideas and representations would be in consonance with those made by you and your delegation for the Creek people. I know that our appeals have gone unheeded for generations. It is a cry now from the graves of helpless thousands and ought to excite some pity; enough, I hope, to stay the executioner for a day at least.

Anything, Chief, that you can and will say to me at any time along this line will meet a sympathetic chord, ready response, and hearty cooperation in any way yet open to us. You are most welcome. The word "intrusion" finds no place in my heart.

Your friend and brother,

John F. Brown
Chief of Seminole Nation

Surely, if the Seminole Nation or its chieftain had had any intimation of the impending termination of the Seminole Nation's fund-of-one-half-of-the-royalties, that fact would have found expression in an unguarded communication to a discreet and sympathetic equal. We can only conclude that Chief Brown had no warning, no suspicion, and no notice.

Before leaving the hearings of the House of Representatives' Committee on Indian Affairs concerning H.R. 15641, it may be desirable to note specifically a report contained in the Appendix to those hearings. The Committee incor- 88
porated the Recommendation of the Select Senate Committee which was appointed under a Senate Resolution of June 30, 1906, "to investigate all matters connected with the condition of affairs in Indian Territory, and specifically to report to Congress legislation necessary therefor." The scope of the investigation included the subject of removal of restrictions on alienation. The aforesaid Recommendation of the Select Senate Committee contains not one word touching upon the Seminole Nation's fund-of-one-half-of-the-royalties.

When the House Committee on Indian Affairs on April 6, 1908, reported out H.R. 15641, with amendments which did not include the section and proviso now being traced, the following discussions occurred on the floor:

> 5076 MR. SHERMAN: The amendments that are now presented to the bill are largely phraseological, to make more clear and distinct the real intent of the bill. I have discussed the bill with the Secretary of the Interior, not with the Commissioner of Indian Affairs, and I know what his attitude toward it is, and I know that the main principle as laid down in this bill meets with the unqualified approval of the Secretary of the Interior. The amendments do not change the question of who shall be given the right to alienate, nor do the amendments change any other principle of the bill
>
> . . .
>
> MR. MANN: Does this bill, then, meet the approval of the Commissioner of Indian Affairs?

MR. McGUIRE: It does.

* * *

5077 MR. SHERMAN: Oh, no; I mean to say that the Secretary of the Interior approved this bill; in fact this bill was drawn in the Interior Department. 89

5078 MR. SULZER: Are the Indians in favor of this bill?

MR. CARTER: Yes, sir; they are.

* * *

5079 MR. FERRIS: Mr. Speaker, in the few moments of time that I have, I desire to acquaint the House with three or four statements that the House ought to know. In the first p[illegible]e, the delegation from Oklahoma, each and ev[illegible]ry member in both the House and the Senate is in favor of this bill. When we came up he[illegible] from Oklahoma we believed that the entire section of the State of Oklahoma was for the removal of these restrictions. It has been debated over the State, both among the Indians and the whites universally interested, and it has been universally asked for . . .

This bill is agreed to by the Secretary of the Interior, by the Indian Office, by the Oklahoma delegation, and has the unanimous consent of the Commissioner of Indian Affairs. These people have all agreed to the bill reported and are anxious to have it pass.

When the House debate was concluded and the bill passed with numerous amendments on the floor (42 Cong. Rec. 5080), the controversial now Section 11 with proviso was

not in. The bill stopped with Section 9 and in the bill was no hint of an involvement of the Seminole Nation's fund-of-one-half-of-the-royalties.

The Senate Committee on Indian Affairs, to which the House-passed bill H.R. 15641 has been referred, reported it out with quite a few far-reaching amendments, surprising amendments considering the accord so emphatically bruited by Congressman Ferris a few weeks earlier in testimony and more recently on the floor of the House (*supra,* 42 Cong. Rec. 5079). Of the Senate amendments, Nos. 36 [of which more anon] and 38 are crucial. But 90
let us let the Senate Committee on Indian Affairs present the language (S. Rep. 575):

> 5427 The next amendment [No. 38] was, on page 10, after line 16, to insert as a new section the following:
>
> Sec. 12***
>
> And all royalties heretofore accrued or hereafter arising from mineral leases by Seminole allottees heretofore or hereafter made shall be paid to the United States Indian Agent, Union Agency, for the benefit of the Indian lessor or his proper representative to whom such royalties shall hereafter belong; and all royalties accrued or hereafter accruing under any oil lease made under Section 13 of the Act of Congress approved January 28, 1898, entitled "An act for the protection of the people of Indian Territory, and for other purposes," shall be paid to allottees of the land included in such lease pro rata according to the respective holdings, or to their lawful assigns.
>
> The amendment was agreed to.

The bill was reported to the Senate as amended, and the controversial proviso was not there. The amendments were concurred in (42 Cong. Rec. 6190). The amendments concurred in included the Senate's Amendment No. 36 which added a proposed Section 10 (42 Cong. Rec. 5426), the language of which is immaterial.

Since the House and Senate versions of H.R. 15641 were at varience, conferees were appointed by both Houses to resolve the differences and, in due course, reported back to their respective Houses. The conferees of the House of Representatives reported:

> 6598 The Committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 15641) for the removal of restrictions from part of the lands of the allottees of the Five Civilized Tribes, and for other purposes, having met, after full and free conference have agreed to recommend, and do recommend to their respective Houses as follows:
>
> * * *
>
> 6599 That the House recede from its disagreement to the amendment of the Senate numbered 38, and agree to the same with an amendment as follows: Strike out all of the proposed amendment and insert in lieu thereof: 91
>
> Sec. 12. That all royalties arising on and after July 1st, Nineteen Hundred and Eight, from mineral leases of allotted Seminole lands heretofore or hereafter made, which are subject to the supervision of the Secretary of the Interior, shall be paid to the United States Indian Agent,

> Union Agency, for the benefit of the Indian lessor or his proper representative,[1] to whom such royalties shall thereafter belong; and no such lease shall be made after said date except with the allottee or owner of the land: *Provided,* That the interest of the Seminole Nation in leases or royalties arising thereunder on all allotted lands shall cease on June thirtieth, Nineteen Hundred and Eight.

And the Congressmen were treated to the following explanation:

> 6782 MR. SHERMAN. Mr. Speaker, I will take just a moment to explain what are the changes made in the bill since it passed the House – in other words, the changes shown by this conference report.
>
> * * *
>
> . . . The main changes are as follows . . . . Another provision provides for the disposal of the moneys arising from the rental of mineral lands in the Seminole Indian Reservation for the benefit of the Seminole Indians . . .

The Senate received an identical report from its conferees (42 Cong. Rec. 6781), but with this explanation:

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[1] In the official print, 35 Stat. 312, 316, there is no comma (,) after "representative." It cannot be determined from the Record whether the omission was intentional, nor does it appear whether it is material.

6781 Amendment No. 38 provides for the disposal of the moneys received as royalties under mineral leases of the lands in the Seminole Nation.

At this point, it might be well to explain how the section 92
and proviso being traced acquired the designation "Section 11." It was "12" when passed by the Senate and replaced in conference, but in that same conference the Senate receded from its Amendment No. 36 which was the Senate-sponsored Section 10 (42 Cong. Rec. 5426). When the Senate receded (*id.*, 6598), that proposed Section 10 became a nullity, the final Section 11 was numbered "10" and the final Section 12 was numbered "11." The Bill H.R. 15641 was approved on May 27, 1908 (42 Cong. Rec. 7311), and became Public Law No. 140 of the 1st Session of the 60th Congress.

At this juncture, a partial summary of the search for Section 11 and its proviso is possible. The record is clear that the Seminole Indians had no inkling during any stage of the House proceedings that anyone contemplated tampering with the Seminole Nation's fund-of-one-half-of-the-royalties. Further, it is apparent that no member of the House knew it. And if the accords heretofore set out are to be believed, that tampering was not contemplated by the Executive Branch either. No wonder no Seminoles testified in defense of the equalization fund; they did not know it was menaced.

It is equally clear from the record that whomever devised the idea in the Senate Committee on Indian Affairs did not contemplate the second step of cutting off the Seminole Nation's fund-of-one-half-of-the-royalties without warning or recourse. Nor was the idea advanced on the floor of the Senate. This Commission shall never know whether a Representative or a Senator advanced the new

and radical idea in the conference to resolve differences 93
on H.R. 15641, for the maintenance of minutes or construction of an account would be repugnant to the "full and free conference" mentioned in the respective conference reports. It seems that the proviso could have been challenged on a point of order in either House, considering that the addition of new legislation by a conference on disagreements is contrary to Section 190 of The General and Permanent Law Relating to The Senate (*e.g.*, S. Doc. No. 2, 87th 1st) and to Section 546 of Jefferson's Manual for guidance of the House (*e.g.*, H. Doc. No. 459, 86th, 2d). The latter specifies:

> The managers of a conference must confine themselves to the differences committed to them, and may not include subjects not within the disagreements, even though germane to a question in issue.

That substantially the same ground rules applied in the first session of the 60th Congress and earlier is clear from an examination of Chapter CXXXV of Volume 5 (1907) of Hinds' Precedents of The House of Representatives, and particularly Sections 6417-6420 of that Chapter 135 (pp. 724-729).

But no point of order was raised and the new measure was passed with speed and without notice or discussion (42 Cong. Rec. 6783). No one then claimed authorship of the proviso to Section 11. However, a rather cursory explanation of Section 11 and its proviso as finally enacted was supplied by the Commissioner of Indian Affairs in his 1908 report to the Secretary of the Interior. The Commissioner reported:

> The agreement with the Seminole Nation, ratified by Congress on July 1, 1898 . . . provided

> that of all royalties produced from allotted lands in that tribe, one-half shall be paid to the allottee and the remaining half into the tribal treasury until the extinguishment of the tribal government. This differed from the rule in force in the other four nations [the other components of the Five Civilized tribes], where allottees received all the royalties. So on the department's recommendation the following clause was inserted in the "restrictions act:" [quoted in Finding No. 9]. 94

This explanation is not wholly consistent with the facts developed above. To recapitulate: When the bill was originally introduced, it was said to be the product of the Department of the Interior. It was said to have the unequivocal approval of that Department and of the Commissioner of Indian Affairs. Departmental representatives testified before the House of complete satisfaction with the bill "as it stands." The section was not contemplated in House debate. The Commissioner of Indian Affairs did not try to add the proviso during the deliberations of the Senate Committee on Indian Affairs for that Committee did not suggest such an amendment. The Commissioner of Indian Affairs waited until the conference on differences and then – apparently – suggested the termination of the Seminole Nation's fund-of-one-half-of-the-royalties as a mere correction of a minor inconsistency.

This conclusion is buttressed by a letter from Secretary of the Interior Garfield to Representative Sherman, dated May 16, 1908. The letter transmitted a long memorandum, also signed by Secretary Garfield, containing numerous changes which were recommended by the Department of the Interior to H.R. 15641 as amended by the Senate.

Page 6 of the memorandum of recommended changes stated in part:

> Lines 22 to 25, inclusive, are changed, as indicated, in order that there may be a fixed date for termination of the one-half interest of the tribe in such leases since the lands have been, or will be, allotted to individuals. This change is also necessary to remove all doubt as to the power of the principal chief (see lines 1 and 2 of pages 11) with respect to the making of such leases covering individual allotments. 95
>
> PAGE ELEVEN
>
> Line 2. Following this line, as rewritten, and after the word "land," insert the following: "Provided, that the interest of the Seminole Nation in leases or royalties arising thereunder on all allotted lands shall cease on June 30, 1908" (See explanation in paragraph above).

The existence of the Secretary's letter and memorandum does not vitiate the Commission's basic conclusion that the Commissioner of Indian Affairs was, as he claimed, the author of the proviso at issue, for it would be only pro forma for the Secretary of the Interior to sign an important communication directed to the House of Representatives.

This Commission concluded herein *(supra)* that the plaintiff's contention that the Dawes Commission's division of land into unequal allotments is actionable is without merit, since the facts of the times do not support the plaintiff's allegations.

This Commission is compelled to conclude that the action of the Commissioner of Indian Affairs in securing the termination proviso, the only possible inference from the sequence of events set out above, was a deliberate effort to harm the Seminole Nation as inconspicuously and as efficiently as possible and, as such, was inconsistent with the concept of fair and honorable dealings. We do not reach the question posed in the hearing, whether Congress in passing Section 11 and its proviso in the manner 96
in which it was done also acted contrary to the concept of fair and honorable dealings.

In the instant Docket No. 204, the Seminole Nation is free to proceed with the effort to prove actual damages resulting from the unfair, dishonorable, and actionable dealings detailed above.

It is so ordered.

Wm. M. Holt
Associate Commissioner

We concur:

Arthur V. Watkins
Chief Commissioner

T. Harold Scott
Associate Commissioner

BEFORE THE INDIAN CLAIMS COMMISSION

* * * * *

INTERLOCUTORY ORDER

Upon the Findings of Fact numbered 1 through 10 and the Opinion this day entered, this Commission concludes as a matter of law:

1. The Dawes Commission did not act wrongfully when it divided the Seminole land allotments by value without taking into consideration the value of oil deposits within some of the allotments.

2. The defendant is not liable to the plaintiff for the said acts of the Dawes Commission in dividing Seminole land allotments by value.

3. The Commissioner of Indian Affairs actionably wronged the plaintiff in the process of securing legislation which terminated the Seminole Nation's equalization fund, which legislation is known as the proviso to Section 11 of the Act of May 27, 1908 (35 Stat. 312, 316).

4. The defendant, by reason of the wrongful act of its representative, the Commissioner of Indian Affairs, is liable for actual damages suffered by the plaintiff resulting from the termination of the equalization fund, which wrongful action was inconsistent with the concept of fair and honorable dealings contained in Clause 5 of Section 2 of the Indian Claims Commission Act of 1946 (25 U.S.C. §70a).

IT IS THEREFORE ORDERED AND ADJUDGED that the instant suit proceed on the single issue of proof of actual damages suffered by the Seminole Nation itself,

as a direct consequence of the wrongful act of the defendant.

Dated at Washington, D.C., this 24th day of June, 1966.

Arthur V. Watkins
Chief Commissioner

Wm. M. Holt
Associate Commissioner

T. Harold Scott
Associate Commissioner

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26 Ind. Cl. Comm. 7

BEFORE THE INDIAN CLAIMS COMMISSION

* * * * *

ORDER DENYING MOTION TO DISMISS

UPON CONSIDERATION of defendant's motion, filed on April 28, 1969, to dismiss the subject claim because the plaintiff has failed to prove damages and the plaintiff's objections thereto, filed on May 2, 1969, and the oral arguments of counsel heard by the Commission on September 17, 1969, and the plaintiff's memorandum, filed on September 19, 1969, in furtherance of the oral argument, the Commission, being fully advised in the premises, concludes that the motion should be denied.

IT IS THEREFORE ORDERED that the motion be, and the same is hereby, denied.

IT IS FURTHER ORDERED that the defendant have 40 days from the date of this order within which to file its requested findings of fact, objections to plaintiff's requested findings of fact (dated March 20, 1969), and brief on the issue of damages.

Dated at Washington, D.C., this 7th day of July, 1971.

/s/ MARGARET H. PIERCE
Margaret H. Pierce, Commissioner

/s/ JOHN T. VANCE
John T. Vance, Commissioner

/s/ BRANTLEY BLUE
Brantley Blue, Commissioner

/s/ RICHARD W. YARBOROUGH
Richard W. Yarborough, Commissioner

Chairman Kuykendall, being of the opinion that the motion should be granted, dissents from the entry of this order.

/s/ JEROME K. KUYKENDALL
Jerome K. Kuykendall, Chairman

APPENDIX D

Act of July 1, 1898, 30 Stat. 567, ratifying Seminole Agreement between the United States and the Seminole Nation, dated December 16, 1897:

CHAP. 542.—An Act To ratify the agreement between the Dawes Commission and the Seminole Nation of Indians.

Whereas an agreement was made by Henry L. Dawes, Tams Bixby, Frank C. Armstrong, Archibald S. McKennon, Thomas B. Needles, the Commission of the United States to the Five Civilized Tribes, and Allison L. Aylesworth, secretary, John F. Brown, Okchan Harjo, William Cully, K.N. Kinkehee, Thomas West, Thomas Factor, Seminole Commission, A.J. Brown, secretary, on the part of the Seminole Nation of Indians on December sixteenth, eighteen hundred and ninety-seven, as follows:

AGREEMENT BETWEEN THE UNITED STATES COMMISSIONERS TO NEGOTIATE WITH THE FIVE CIVILIZED TRIBES, AND THE COMMISSIONERS ON THE PART OF THE SEMINOLE NATION.

This agreement by and between the Government of the United States of the first part, entered into in its behalf by the Commission to the Five Civilized Tribes, Henry L. Dawes, Tams Bixby, Frank C. Armstrong, Archibald S. McKennon, and Thomas B. Needles, duly appointed and authorized thereunto, and the Government of the Seminole Nation in Indian Territory, of the second part, entered into on behalf of said Government by its Commission, duly appointed and authorized thereunto, viz, John F. Brown, Okchan Harjo, William Cully, K.N. Kinkehee, Thomas West, and Thomas Factor;

Witnesseth, That in consideration of the mutual undertakings herein contained, it is agreed as follows:

All lands belonging to the Seminole tribe of Indians shall be divided into three classes, designated as first, second, and third class; the first class to be appraised at five dollars, the second class at two dollars and fifty cents, and the third class at one dollar and twenty-five cents per acre, and the same shall be divided among the members of the tribe so that each shall have an equal share thereof in value, so far as may be, the location and fertility of the soil considered; giving to each the right to select his allotment so as to include any improvements thereon, owned by him at the time; and each allottee shall have the sole right of occupancy of the land so allotted to him, during the existence of the present tribal government, and until the members of said tribe shall have become citizens of the United States. Such allotments shall be made under the direction and supervision of the Commission to the Five Civilized Tribes in connection with a representative appointed by the tribal government; and the chairman of said Commission shall execute and deliver to each allottee a certificate describing therein the land allotted to him.

All contracts for sale, disposition, or encumbrance of any part of any allotment made prior to date of patent shall be void.

Any allottee may lease his allotment for any period not exceeding six years, the contract therefor to be executed in triplicate upon printed blanks provided by the tribal government, and before the same shall become effective it shall be approved by the principal chief and a copy filed in the office of the clerk of the United States court at Wewoka.

No lease of any coal, mineral, coal oil, or natural gas within said Nation shall be valid unless made with the tribal government, by and with the consent of the allottee and approved by the Secretary of the Interior.

Should there be discovered on any allotment any coal, mineral, coal oil, or natural gas, and the same should be operated so as to produce royalty, one-half of such royalty shall be paid to such allottee and the remaining half into the tribal treasury until extinguishment of tribal government, and the latter shall be used for the purpose of equalizing the value of allotments; and if the same be insufficient therefor, any other funds belonging to the tribe, upon extinguishment of tribal government, may be used for such purpose, so that each allotment may be made equal in value as aforesaid.

The townsite of Wewoka shall be controlled and disposed of according to the provisions of an act of the General Council of the Seminole Nation, approved April 23d, 1897, relative thereto; and on extinguishment of the tribal government, deeds of conveyance shall issue to owners of lots as herein provided for allottees; and all lots remaining unsold at that time may be sold in such manner as may be prescribed by the Secretary of the Interior.

Five hundred thousand dollars ($500,000) of the funds belonging to the Seminoles, now held by the United States, shall be set apart as a permanent school fund for the education of children of the members of said tribe, and shall be held by the United States at five per cent interest, or invested so as to produce such amount of interest, which shall be, after extinguishment of tribal government, applied by the Secretary of the Interior to the support of Mekasuky and Emahaka Academies and the district schools of the Seminole people; and there shall

be selected and excepted from allotment three hundred and twenty acres of land for each of said academies and eighty acres each for eight district schools in the Seminole country.

There shall also be excepted from allotment one-half acre for the use and occupancy of each of twenty-four churches, including those already existing and such others as may hereafter be established in the Seminole country, by and with consent of the General Council of the Nation; but should any part of same, at any time, cease to be used for church purposes, such part shall at once revert to the Seminole people and be added to the lands set apart for the use of said district schools.

One acre in each township shall be excepted from allotment and the same may be purchased by the United States upon which to establish schools for the education of children of non-citizens when deemed expedient.

When the tribal government shall cease to exist the principal chief last elected by said tribe shall execute, under his hand and the seal of the Nation, and deliver to each allottee a deed conveying to him all the right, title, and interest of the said Nation and the members thereof in and to the lands so allotted to him, and the Secretary of the Interior shall approve such deed, and the same shall thereupon operate as relinquishment of the right, title, and interest of the United States in and to the land embraced in said conveyance, and as a guarantee by the United States of the title of said lands to the allottee; and the acceptance of such deed by the allottee shall be a relinquishment of his title to and interest in all other lands belonging to the tribe, except such as may have been excepted from allotment and held in common

for other purposes. Each allottee shall designate one tract of forty acres, which shall, by the terms of the deed, be made inalienable and nontaxable as a homestead in perpetuity.

All moneys belonging to the Seminoles remaining after equalizing the value of allotments as herein provided and reserving said sum of five hundred thousand dollars for school fund shall be paid per capita to the members of said tribe in three equal installments, the first to be made as soon as convenient after allotment and extinguishment of tribal government, and the others at one and two years, respectively. Such payments shall be made by a person appointed by the Secretary of the Interior, who shall prescribe the amount of and approve the bond to be given by such person; and strict account shall be given to the Secretary of the Interior for such disbursements.

The loyal Seminole claim shall be submitted to the United States Senate, which shall make final determination of same, and, if sustained, shall provide for payment thereof within two years from date hereof.

There shall hereafter be held at the town of Wewoka, the present capital of the Seminole Nation, regular terms of the United States court as at other points in the judicial district of which the Seminole Nation is a part.

The United States agrees to maintain strict laws in the Seminole country against the introduction, sale, barter, or giving away of intoxicants of any kind or quality.

This agreement shall in no wise affect the provisions of existing treaties between the Seminole Nation and the United States, except in so far as it is inconsistent therewith.

The United States courts now existing, or that may hereafter be created, in Indian Territory shall have exclusive jurisdiction of all controversies growing out of the title, ownership, occupation, or use of real estate owned by the Seminoles, and to try all persons charged with homicide, embezzlement, bribery, and embracery hereafter committed in the Seminole country, without reference to race or citizenship of the persons charged with such crime; and any citizen or officer of said nation charged with any such crime, if convicted, shall be punished as if he were a citizen or officer of the United States, and the courts of said nation shall retain all the jurisdiction which they now have, except as herein transferred to the courts of the United States.

When this agreement is ratified by the Seminole Nation and the United States the same shall serve to repeal all the provisions of the Act of Congress approved June seventh, eighteen hundred and ninety-seven, in any manner affecting the proceedings of the general council of the Seminole Nation.

It being known that the Seminole Reservation is insufficient for allotments for the use of the Seminole people, upon which they, as citizens, holding in severalty, may reasonably and adequately maintain their families, the United States will make effort to purchase from the Creek Nation, at one dollar and twenty-five cents per acre, two hundred thousand acres of land, immediately adjoining the eastern boundary of the Seminole Reservation and lying between the North Fork and the South Fork of the Canadian River, in trust for and to be conveyed by proper patent by the United States to the Seminole Indians, upon said sum of one dollar and twenty-five cents per acre being reimbursed to the United States by said Seminole

Indians; the same to be allotted as herein provided for lands now owned by the Seminoles.

This agreement shall be binding on the United States when ratified by Congress and on the Seminole people when ratified by the general council of the Seminole Nation.

In witness whereof the said Commissioners have hereunto affixed their names at Muskogee, Indian Territory, this sixteenth day of December, A.D. 1897.

HENRY L. DAWES,
TAMS BIXBY,
FRANK C. ARMSTRONG,
ARCHIBALD S. MCKENNON,
THOMAS B. NEEDLES,
Commission to the Five Civilized Tribes.

ALLISON L. AYLESWORTH,
Secretary.

JOHN F. BROWN,
OKCHAN HARJO,
WILLIAM CULLY,
K. N. KINKEHEE,
THOMAS WEST,
THOMAS FACTOR,
Seminole Commission.

A. J. BROWN,
Secretary.

Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the same be, and is hereby, ratified and confirmed, and all laws and parts of laws inconsistent therewith are hereby repealed.

Approved, July 1, 1898.

APPENDIX E

Sections 2 and 20(c)
Indian Claims Commission Act,
approved August 13, 1946, c959,
60 Stat. 1049, 1050, 1055, as amended
(25 U.S.C. 70a and 70s):

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* * *

§70a. Jurisdiction; claims considered; offsets and counterclaims

The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims

based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after August 13, 1946, shall be considered by the Commission.

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* * *

20(c) Determinations of questions of law by the Court of Claims under this section shall be subject to review by the Supreme Court of the United States in the manner prescribed by section 288 of Title 28. Aug. 13, 1946, c. 959, §20, 60 Stat. 1054; Sept. 8, 1960, Pub. L. 86-722, 74 Stat. 829.

APPENDIX F

Deft. Ex. 14, Appeal Inst. No. 37

Excerpt from Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1907, Vol. I, pp. 23-24:

"A most careful investigation has been made of all of these conditions. I have personally been to the Territory and conferred with the leading representatives of the Indian tribes and the white citizens, their neighbors. There are many Indians who insist that no restrictions shall be removed except as now provided by law. On the other hand, there are white men who wish to have all the restrictions removed and the Indians thrown immediately upon their own resources. Neither of these positions is tenable. Those Indians who are now as capable as the average white man of caring for their property and performing all the duties of citizens should be placed upon the same footing and given the same burdens as the white man. In no other way can these men become independent, self-supporting citizens. But for those who are not so qualified, the Government must continue to act as guardian as far as their land is concerned. The experience since the opening of this territory to white settlement shows most clearly that it is not safe to remove all restriction. The dealings of the white man in the Indian Territory, in the acquisition of the valuable agricultural and oil lands, have shown too many instances of unconscionable greed and dishonesty. The agricultural lands in the Indian Territory are wonderfully fertile, having increased many-fold in value during the past ten years. But, in addition to this, the discovery of the deposits of oil

and coal has made certain sections of that country very much more valuable and has tremendously increased the desire of white men to obtain control of those sections. Thus far these oil and coal lands have been handled under a system of leasing controlled by the Interior Department."

Cl. Ex. 2(a), Appeal Inst. No. 38,

Excerpts from Hearings Before the Committee on Indian Affairs, House of Representatives, 60th Cong., 1st Sess., Removal of Restrictions on Indian Lands in Oklahoma, H.R. 15641 (1908)

Statement of J. C. Johnson, Representing the Freedmen Citizens of the Creek Nation, at pp. 13-14:

* * * * *

"MR. JOHNSON. Yes. Now, gentlemen, I would like to say, before I close here, that it was contended in 1907, I believe, or possibly it was in 1906, by several corporations down there who were represented by their attorneys before the Senate committee, that the restriction should be removed from these homesteads in order to give the citizens of the new State more taxable land, and they cited

that in a good many instances this land would be purchased by farmers -- a farming class of people – and that the whole people would be benefited by it. They brought numerous instances to show where the Indians and freedmen were not doing anything with the lands and the lands were lying idle, and they said that if it was put on the market so that it could be sold, homesteaders would come in and buy that land. I hardly think that is true, and for this reason: When the restrictions were removed in 1904 I think it is safe to say that out of all the lands that were sold down in that country not 10 per cent of them went into the hands of the farming class. Farmers did not get a chance to buy that land. It was bought up by speculators, and those are the men who are here to-day asking Congress to remove the restrictions from those lands."

* * *

Statement of M. L. Mott,
Attorney for the Creek Nation, at p. 52:

* * *

"The restrictions were removed as to these freedmen citizens in 1904. The removal of those restrictions was a calamity, a misfortune, as I know, because I got there in fifteen days after that law went into effect; and of all the disreputable methods, unjustifiable, unwarranted, that could be imagined, they were in use. Every species of trickery, every species of device and fraud was resorted to to get the land from these people, and in seven out of ten cases the land went without any valuable consideration, Mr. Chairman."

* * *

Statement of George A. Ward,
Attorney Representing Department of the Interior,
at p. 69:

* * *

"Take the Seminole Nation alone; there has not a title to a foot of land in the Seminole Nation passed, not a foot, because there has not been a deed recorded; there has not been a deed signed by the Secretary of the Interior in the Seminole Nation. Yet they have gone in there and bought 1,357 tracts from the Seminole Indians. We want to go to some court where we can have those deeds set aside. What did Mr. West do with these 49 cases Mr. Woodruff mentioned? We asked to have them taken to the United States court. Mr. West is the district judge for Seminole County, and he said, "The United States court has not any jurisdiction in these cases," and he refused to certify them, dismissed the cases, and now what have we to do? We have to go to the expense of having a transcript of all that record made and bring those cases in the Federal court. There were 349 in one bunch."

* * *

Deft. Ex. 15, Appeal Inst. No. 37

Excerpt from 42 Congressional Record, 60th Cong., 1st Sess., p. 5077, dated April 22, 1908, Debate on H.R. 15641

"MR. SHERMAN. Oh, no; I mean to say that the Secretary of the Interior approved this bill; in fact, this bill was drawn in the Interior Department."

* * *

Excerpts from the Letter and Memorandum of James R. Garfield, Secretary of the Interior, to Hon. James E. Sherman, Chairman, Committee on Indian Affairs, House of Representatives, dated May 16, 1908, containing numerous changes which were recommended by the Department of the Interior to H.R. 15641, as amended by the Senate (under certificate from the National Archives and Records Service):

* * *

"* * * A memorandum has been prepared and attached to the copy of the act briefly setting forth the necessity and the desirability of the proposed changes.

"It is not believed any of the suggestions affect, nor are they intended to affect, the general purpose of this act, namely, the absolute removal of restrictions from certain classes of members of the Five Civilized Tribes. It is, however, of the highest importance that, in so far as the remaining class of Indians are concerned whose lands are to continue under restrictions and under the supervision of this Department, the Government be given this authority in no uncertain terms. The purpose of these suggestions is to assist in making the language of the act clear and definite as to the duty and powers of the Government dealing with, handling, and protecting property interests of Indians whose lands are to remain under restriction. Certain minor changes have been suggested in the latter part of the bill which contains amendments pertaining to miscellaneous matters."

* * *

"Memorandum showing proposed changes in H.R. 15641, entitled an Act for the removal of restrictions, etc., as it passed the Senate, May 12, 1908:

* * *

"Lines 22 to 25, inclusive, are changed, as indicated, in order that there may be a fixed date for termination of the one-half interest of the tribe in such leases since the lands have been, or will be, allotted to individuals. This change is also necessary to remove all doubt as to the power of the principal chief (see lines 1 and 2 of page 11) with respect to making of such leases covering individuals allotments.

"PAGE ELEVEN.

"Line 2. Following this line, as rewritten, and after the word 'land', insert the following: 'Provided, that the interest of the Seminole Nation in leases or royalties arising thereunder on all allotted lands shall cease on June 30, 1908' (See explanation in paragraph above.)"

This letter and memorandum were cited and relied upon by the Indian Claims Commission in its findings and opinion of June 24, 1966, 17 Ind. Cl. Comm. 67, 74, 94-95, App. pp. 56a-57a, 78a-79a.

* * *

Cl. Ex. 2(s), Appeal Inst. No. 38

Excerpt from *Petroleum and Natural Gas in Oklahoma*, p. 139, by L. C. Snider, A.M., The Harlow-Ratliff Co., Oklahoma City, 1913:

* * *

"The geologic conditions of Seminole County are very favorable for the occurrence of oil and gas. The rocks are sandstones and shales of Pennsylvanian age and borings should encounter about the same character of rocks as in the other pools south of the Arkansas River. Practically no detailed geologic work has been done in the county, but it is known that there is some gentle folding which should give favorable places for the accumulation of oil and gas."

* * *

Cl. Ex. 2(g), Appeal Inst. No. 38:

Excerpt from Report of the Commissioner of Indian Affairs for the Fiscal Year Ended June 30, 1914, pp. 223-224:

"SEMINOLE NATION

* * *

"Since the last annual report 205 deeds to Seminole allottees have been delivered. There are about 800 deeds to restricted allottees which are being held at this office, under instructions of the department for investigation as to many alleged illegal conveyances affecting the lands described therein; also 751 deeds to unrestricted allottees who, it is claimed, sold their lands for grossly inadequate considerations are in the hands of James E. Gresham, special assistant to the Attorney General, at Wewoka, Okla.,

who has charge of suits and other matters affecting the rights and titles to lands in the Seminole Nation."

* * *

Deft. Ex. 33, Appeal Inst. No. 37

Claims of the Seminole Indians Against the United States.

Excerpt from Hearing before the Committee on Indian Affairs, United States Senate, 71st Cong., 2d Sess., on S.3041, Friday, April 11, 1930, pp. 8, 10-11:

Exhibit 1

MEMORIAL OF THE SEMINOLES

To the Senate and House of Representatives: January 6, 1930.

* * *

Thereupon the conference committee recommended the passage of section 11 of this act, and when the conference report was adopted by both Houses, section 11 was written into the removal of restrictions act in which it had no proper place, as follows, to wit:

"Sec. 11. That all royalties arising on and after July 1, 1908, from mineral leases of allotted Seminole lands heretofore or hereafter made, which are subject to the supervision of the Secretary of the Interior, shall be paid to the United States Indian agent, Union Agency, for the benefit of the Indian lessor or his proper representative, to whom such royalty shall thereafter belong; and no such lease shall be made after said date except with the allottee or owner of the land: *Provided,* That the interest of the Seminole Nation in leases or royalties arising thereunder on all allotted lands shall cease on June 30, 1908."

Your memorialists humbly represent that the Seminoles did not agree to this provision, did not know anything about it, that this provision of the statute purported to take away from the Seminoles as a group the mineral right vested in them, and their heirs, and to invest it in allottees without their knowledge or consent, and thereby purported to divest such allottees as a group of the right vested in them and to invest such mineral right in the allottees holding the surface and in the alien vendees who previously had bought the surface rights from various citizens of the Seminole Tribe, or who might thereafter do so.

Your memorialists humbly represent that this was a violation of the fifth amendment to the Constitution of the United States in taking from your memorialists vested property rights without consideration, without their consent, without due process of law.

We did not consent to this act, and were not consulted, and had no means of defending ourselves against it, and humbly represent that it was not a lawful exercise of power by the Congress; that the Congress itself did not understand what was being done to the defenseless Seminole Indians; that this provision, section 11 aforesaid, was not considered by either the House or the Senate, or by the Committee on Indian Affairs of the House or of the Senate, and that even the conference committee did not appear to understand it, because the chairman of the House committee himself did not appear to understand it, as he explained it to the Congress in the Congressional Record of May 22, 1908, page 6782. Mr. Sherman said:

"Section 11 provides for the disposal of moneys arising from the rental of mineral lands in the Seminole Indian Reservation."

As a matter of fact, it provided for taking from the Seminoles as a group their vested property rights without their knowledge or consent, and against their interest as a group, and turning over a substantial part of it to those who were not Seminoles and who had not paid for it, and opening the door by which these mineral rights could be exploited, used, and appropriated by persons who were not Seminoles.

There was no explanation made of this matter in the Senate. The conference report was adopted by both Houses without realizing what was done to the Seminoles. For these reasons, and because the Seminoles desire to hold this mineral property vested in them by the Seminole agreement in the same manner as Congress authorized the Osages to do, and because a number of suits are pending between third parties involving these rights in which the Seminoles ought to have the right to intervene, the Seminoles appeal to your honorable bodies to pass the bill providing them an opportunity to be heard in the courts for the quieting of these titles in the manner set forth in Senate bill 3041. Your memorialists believe that this will meet the approval of over 90 per cent of the Seminole people, because over 90 per cent of them have, by this action, been deprived of any participation in the value of the royalties arising to which they were entitled.

* * *

Cl. Ex. 2(u), Appeal Inst. No. 38

Excerpt from Memorandum of June 13, 1930, on S. 3041, from Northcutt Ely, Esquire, Executive Assistant to the Secretary of the Interior, to Judge Finney, Solicitor of the Department of the Interior:

"* * * In my opinion, the United States did break its agreement in enacting the law which divested the tribe of the royalty interest and passed it to the individual allottee, and perhaps the tribe or the individuals who can be construed to have succeeded to the rights of the tribal entity are entitled to compensation for that wrong. * * If a wrong has been done the tribe, the United States and not the present individual royalty holders did it and the suit should be against the United States alone.

"* * * In any event the ultimate loser, if there is any merit to the tribal claim, should be the United States. The issue might just as well be shortened by making this litigation directly between the plaintiffs and the United States."

Excerpt from Memorandum of June 21, 1930, Joseph M. Dixon, First Assistant Secretary of Interior, to Secretary of Interior Wilbur on S.3041, a jurisdictional bill on Seminole claims under the 1908 Act:

* * *

"I submit my differing 'memorandum' under the belief that a gross injustice was originally done the Seminole Indians by the allotment act of May 27, 1908.

"I have reread the proceedings in the House and Senate at the time the bill was passed, and also the conference committees' reports to the two Houses on that legislative item, so profoundly affecting the Seminole Indians, and have no hesitancy in saying that in the conference report on the Seminole bill, May, 1908, the conferees had no parliamentary or legal right to insert a new item in the bill which had not been agreed to or passed by either the Senate or the House, but evidently in the pressure of legislative business at the time, it was agreed to by both Houses without any real knowledge of what the ultimate intent or effect would be.

"I have no doubt that this legislation embodied in the conferees' report was enacted without the knowledge or consent of the Seminole Indians themselves, and that it in effect dispossessed the Seminole Indians of great mineral wealth, in which they had the undisputed legal title as owners of the land by purchase with their own moneys 40 years before.

"I have no doubt that Congress even under its plenary powers had no moral right to thus dispossess the Seminole Indians of this great mineral wealth."

* * *

"It has been suggested that Congress had the authority to enact the provisions of Section 11 of the Act of May 27, 1908, under the plenary power and authority of Congress over Indian tribal relations and property and various cases are cited. The cases cited confirm the administrative power of Congress, but nowhere does it appear that they confirm the power of Congress to divest the Indian of his property and give it to others without his consent and without adequate compensation, and this is the point of the present controversy upon which the Seminoles seek a decision of the Supreme Court of the United States."

Figure 1. Date of discovery or of production of oil or gas in counties of Oklahoma

Oklahoma Geological Survey Semi-Centennial Report, 1908-1958
Norman, 1958, P. 31

Excerpt from the Report of the Commission to the Five Civilized Tribes, Washington, D. C., November 20, 1894, p. lxiv, Cong. Ser. 3305, H. Ex. Doc., Vol. 14, 53d Cong., 3d Sess., 1894-1895:

* * *

"SEMINOLE NATION.

"In answer to our letter to the governor of the Seminole tribe, he suggested that the national council of the Seminole tribe would convene early in April and named the 6th day of April, 1894, as the time and Wewoka as the place he desired this commission to meet and address said council. Pursuant to such suggestion we met and addressed the council and a large number of citizens of said tribe. Afterwards the council met and adopted resolutions declining to take any action whatever with a view of negotiating with this commission. Not having done so before, we, on the 26th day of July, 1894, in order to make our propositions more specific and definite, and to obtain a clear response thereto, submitted to the Seminole tribe the following propositions:

"PROPOSITIONS TO THE SEMINOLES.

"The Commission to the Five Civilized Tribes, appointed by the President under section 16 of an act of Congress, approved March 3, 1893, propose to treat with the Seminole Nation on the general lines indicated below, to be modified as may be deemed wise by both parties after discussion and conference.

"First. To divide all lands now owned by the Seminole Nation, not including town sites, among all citizens according to the treaties now in force, reserving town sites, coal

and minerals, for sale under special agreement. Sufficient land for a good home for each citizen to be inalienable for twenty-five years, or such longer period as may be agreed upon."

* * *

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-272

SEMINOLE NATION OF OKLAHOMA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

1. Petitioner filed a complaint in the Indian Claims Commission seeking judgment against the United States for one-half of all mineral "royalties"[1] recovered from the area encompassed within the former Seminole Reservation established by the Treaty of March 21, 1866, 14 Stat. 755. These royalties had previously been paid to individual Seminole allottees, or their legal transferees, pursuant to the terms of the agreement reached between the Seminole Tribe and Commissioners of the United States in 1897,[2] ratified by Congress in the Act of July 1, 1898, 30 Stat. 567, and implemented by a series of statutes, particularly

[1]The term "royalties" is apparently used in the general sense of income from the production of minerals.

[2]The agreement was negotiated by the Commission to the Five Civilized Tribes, commonly called the Dawes Commission. This Court has had occasion to consider the history of the Dawes Commission in detail. See, *e.g.*, *Heckman* v. *United States*, 224 U.S. 413; *Mullen* v. *United States*, 224 U.S. 448; *Goat* v. *United States*, 224 U.S. 458; *Woodward* v. *DeGraffenried*, 238 U.S. 284.

the Act of March 3, 1903, 32 Stat. 1008; Act of April 21, 1904, 33 Stat. 189; Res. 7 of March 2, 1906, 34 Stat. 822; Act of April 26, 1906, 34 Stat. 137; and the Act of May 27, 1908, 35 Stat. 312. Petitioner contends that the Seminole Agreement, as ratified, reserved to the Tribe—rather than to individual Seminoles to whom the tribal land was allotted in fee—a one-half interest in any minerals derived from land within the original Seminole Reservation. Therefore, petitioner contends, the Act of May 27, 1908, which directed that all such royalties be paid to the individual Seminole allottees or their transferees, was inconsistent with the intent of the Seminole Agreement and "unfair and dishonorable" within the meaning of Clause 5 of the Indian Claims Commission Act (25 U.S.C. 70a).

On June 24, 1966, the Commission decided that the motive of the Commissioner of Indian Affairs, in allegedly advocating enactment of the Act of May 27, 1908, *supra*, might be the basis for a cause of action under Clause 5 of the Act, and that the case should proceed "on the assumption that if a justiciable controversy exists, the plaintiff will undertake to establish a viable theory of recovery and measure of damages at some future date."[3]

After presentation of evidence, the Commission found that no minerals had been produced in paying quantity prior to the enactment of the Act of May 27, 1908, which clearly called for payment to allottees, and dismissed the complaint for failure to state a claim upon which relief could be granted under any clause of the Indian Claims Commission Act.[4] On petitioner's appeal, the Court of

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[3]Pet. App. C 65; 17 Ind. Cl. Comm. 67, 82-83.

[4]Pet. App. B 18-46; 28 Ind. Cl. Comm. 117, rehearing denied, Pet. App. B 47; 29 Ind. Cl. Comm. 421. Two commissioners dissented. While expressly repudiating the "improper motive" theory which was the focal point of the Commission's 1966 speculation, the dissenting commissioners would have allowed the case to remain on the docket for further proof of possible damage. The dissenters thought that the 1908 statute was inconsistent with the intent (though, apparently, not the language) of the 1898 Seminole Agreement. Pet. App. B 32-36; 28 Ind. Cl. Comm. 117, 132-136.

Claims unanimously affirmed the dismissal (498 F. 2d 1368; Pet. App. A 1-17).

Both the Commission and the Court of Claims held that:

(1) the overriding purpose of the Seminole Agreement was to allot all Seminole tribal land to individual members of the tribe on an equal basis. To this end, "the parties went to great lengths to insure that the allotments to individual Indians would be as equal as possible * * *" (Pet. App. A 4);

(2) in order to effectuate this goal, the agreement provided that any Seminole tribal lands known to contain minerals were not to be allotted to any individual. Rather, they were to be sold prior to allotment "and the proceeds from such sales were [to be] paid into the tribal treasury for eventual per capita distribution * * *" (*ibid.*);

(3) to provide for the contingency of unexpected mineral discovery on allotted lands between the time allotment sites were selected and the time allotment deeds were issued,[5] the agreement included an "equalization clause" which would operate, if at all, to prevent a few allottees from obtaining, by fortuity, an allotment which had greater value at the time deeds were issued than it possessed at the time of site selection. The clause provided for payments "into the tribal treasury until extinguishment of tribal government * * * [to]be used for the purpose of equalizing the value of allotments * * * so that each allotment may be made equal in value as aforesaid * * *" (30 Stat. 567, 568);

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[5]The deed conveyed to each allottee "* * * all the right, title, and interest * * * in and to the lands * * *" and was "* * * a guarantee by the United States of the title of said lands to the allottee * * *." 30 Stat. 567, 568.

(4) the process of issuing allotment deeds being substantially completed by 1908, Congress chose a "date certain" (July 1, 1908) after which all royalties arising from mineral production on allotted land were to be paid to the United States "for the benefit of the Indian lessor or his proper representative to whom such royalties shall thereafter belong * * *" (Act of May 27, 1908, 35 Stat. 312, 316);

(5) the 1908 statute was consistent with the intent of the Seminole Agreement to vest fee simple title to all allotted land in the allottees;

(6) the subsequent statutes and agreements affirm that the 1898 Agreement vested no mineral interest in the Tribe;

(7) petitioner has therefore failed to show any damages or basis for relief.

2. The opinions below, upon which we rely, are thorough and correct in their resolution of the narrow question of statutory construction here presented. Further review by this Court is not warranted.

a. Contrary to petitioner's unsupported claim, the decisions below are in accord with the uniform course of federal judicial and administrative construction of the particular statutory clause at issue in this case. The language and intent of the relevant clause of the Seminole Agreement has been similarly construed by the Court of Appeals for the Tenth Circuit twice, *Moore* v. *Carter Oil Company,* 43 F.2d 322, certiorari denied, 282 U.S. 903; *Fish* v. *Wise,* 52 F.2d 544, certiorari denied, 284 U.S. 688; and by the Attorney General, 35 Op. A.G. 421. And the Tenth Circuit's opinions in *Moore* and *Fish* in turn relied on this Court's prior decisions in *Goat* v. *United States,* 224 U.S. 458, which examined in detail another important

statute (the Act of April 26, 1906, 34 Stat. 137) implementing the Seminole Agreement of 1898, and on *Woodward* v. *DeGraffenried,* 238 U.S. 284.[6]

All of these decisions were properly relied upon by the Commission and the Court of Claims here. And there is no support in any of these opinions or in any other authority for petitioner's contention that the Seminole Agreement either legally or morally reserved rights in the mineral estate to the Tribe, rather than transmitting them, in fee, to the individual Seminole allottees.

b. The decisions below, contrary to petitioner's argument (Pet. 4, 34), do not conflict with this Court's recent decision in *United States* v. *Jim,* 409 U.S. 80. That case involved only a change in the "pattern of distribution" (409 U.S. at 82) of benefits derived from income generated by assets held on behalf of the tribe. The decision in no way questions the settled proposition that when Congress elects to do so, as it did here, it is empowered to transmute tribal property (by means of the allotment process) to holdings of the individual tribal members. Compare *United States* v. *Jim,* 409 U.S. 80, 82, with *Seminole Nation* v. *United States,* 316 U.S. 286, 295-296, and *Woodward* v. *DeGraffenried, supra,* 238 U.S. at 306-307.

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[6]In *Goat,* the Court held that after the Act of April 26, 1906, became law, all Seminole allottees "* * * stood in precisely the same position * * * as though they had received their allotments without any restriction upon their right to alienate the interest thus acquired." 224 U.S. at 468-469. In *Woodward,* the Court emphasized the differences between allotments of Seminole tribal lands under the Seminole Agreement of 1898 and allotments involving other Oklahoma tribes made pursuant to the Curtis Act (Act of June 28, 1898, 30 Stat. 495). 238 U.S. at 306-307.

As the Court of Claims here held, the Seminole Agreement "established an express trust with the tribal government as trustee and the individual allottees as beneficiaries" and "[n]o rights vested in the tribal government, only duties" (Pet. App. A 15). Petitioner's claim (Pet. 34-36) that this holding conflicts with prior decisions of this Court is without foundation. Petitioner itself brought the earlier suit which led to this Court's express holding that the Seminole tribal government was the trustee for funds received under the 1898 Seminole Agreement. *Seminole Nation* v. *United States, supra*, 316 U.S. at 296. The United States was held to be only "a third party" (*ibid.*), and the case was remanded to the Court of Claims to ascertain whether the Tribe was acting in disregard of its fiduciary responsibilities to the individual Seminoles who were beneficiaries of the trust created by the Seminole Agreement.[7]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.

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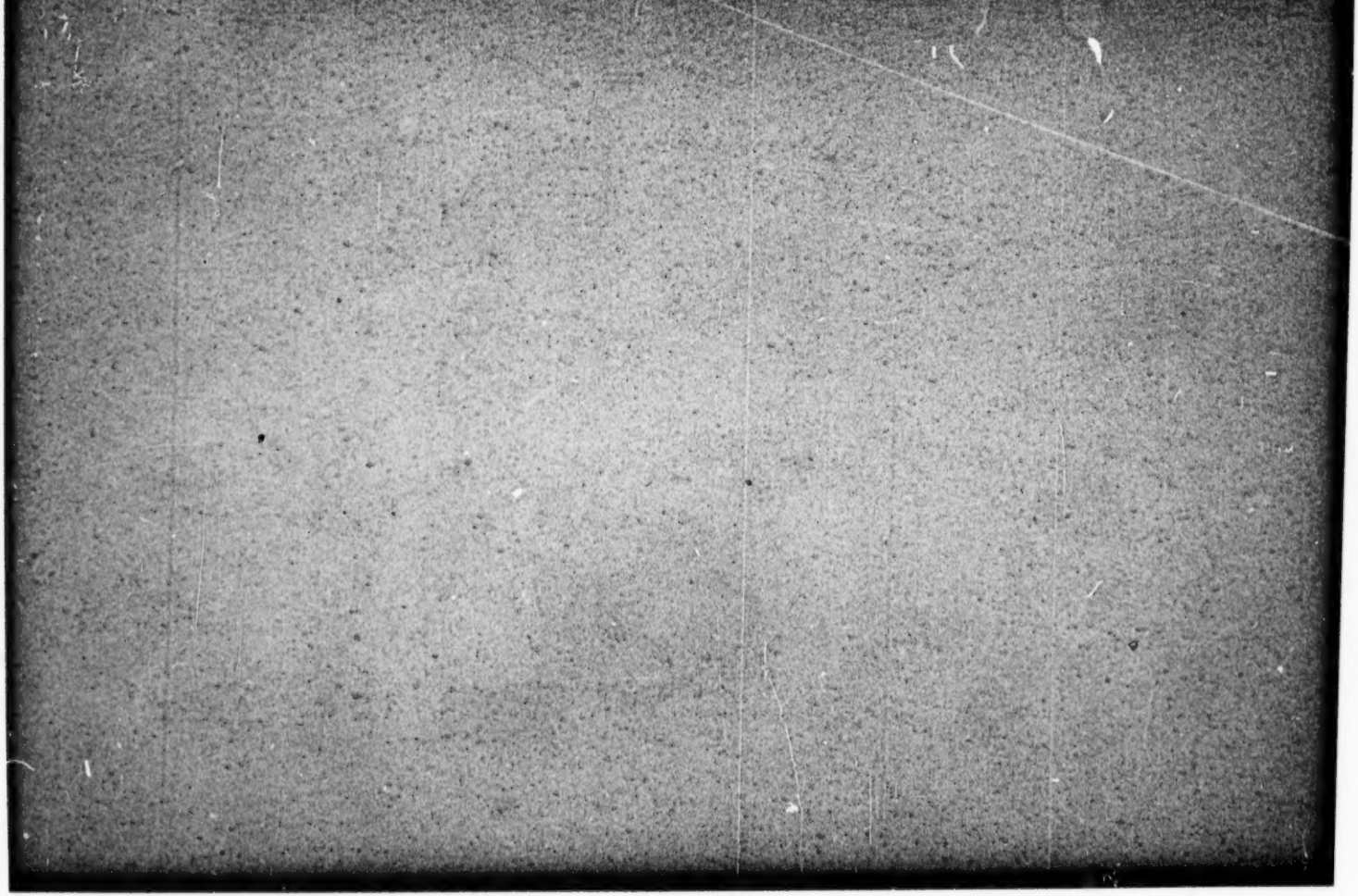
[7]On remand, the Court of Claims held that neither the Tribe nor the United States had abused its trust and dismissed the claim for failure of proof. *Seminole Nation* v. *United States*, 102 Ct. Cl. 565, certiorari denied, 326 U.S. 719-720.



COURT, U. S.

JAN 21 1975

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-272

THE SEMINOLE NATION OF OKLAHOMA,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For a Writ of Certiorari to
The United States Court of Claims

PETITIONER'S REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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On Petition For a Writ of Certiorari to The United States Court of Claims

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PETITIONER'S REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In response to the Government's memorandum in opposition to the granting of the writ of certiorari, petitioner states that the Government fails to rebut the conflicts between the cases cited in the petition, and the decision of the Court of Claims herein. The cases cited in the petition clearly show the conflicts, which this Court should resolve upon the granting of the petition.

1. Respondent has completely ignored the gravamen of the case, which is:

> Whether the passage of Section 11 of the Act of 1908, inserted at the instigation of respondent's Commissioner of Indian Affairs, without the knowledge and consent of the Seminole Nation, and which destroyed the Seminole Nation's one-half interest in the mineral rights and royalties expressly reserved to it in the Seminole Agreement of 1898, created liability of the United States under the fair and honorable dealings provision of Clause 5, Section 2 of the Indian Claims Commission Act.

This issue has never been decided by this Court, nor has Clause 5 been interpreted by this Court. The Court of Claims decision herein is clearly in conflict with its decision in the *Kiowa Case* (Pet. pp. 5, 7, 38, 41), and also with its decision in *United States v. New York Emigrant Indians,* 177 Ct. Cl. 263, 277-279 (1966). Both of these cases hold that where treaties and agreements approved by Congress at the instigation of the Government which destroyed tribal property rights, without the knowledge and consent of the tribe, liability on the part of the United States is established under said Clause 5.

Respondent (Resp. Memo. p. 2) misstates petitioner's contention with respect to Section 11 of the 1908 Act. Petitioner's contention is related to the *manner* in which passage of Section 11 of the 1908 Act was obtained at the instigation of respondent's Commissioner of Indian Affairs, and without the knowledge and consent of the Seminole Nation, to its detriment. Petitioner does not question the power of Congress to change the distribution of tribal property without destroying tribal property rights; but it does question the *manner* in which it was done in this case

so as to bring it within the purview of the new cause of action with respect to fair and honorable dealings created for the first time in 1946 under Clause 5, Section 2 of the Indians Claims Commission Act.

As set forth in the petition, pages 25-26, the destruction of the tribal right by Section 11 of the 1908 Act, without the knowledge and consent of the Seminole Nation, deprived over 90 percent of the individual allottees from participation in the royalties due under the 1898 Agreement. (Appendix, pp. 95a-96a, 99a-100a, 102a, 104a).

2. Contrary to respondent's statements:

a. (Resp. Memo. p. 2, first par.). The record shows that the process of issuing allotment deeds to Seminole allottees was not begun until long after the passage of Section 11 of the 1908 Act. (Appendix to Pet., pp. 96a, 99a-100a);

b. (Resp. Memo. p. 2, last par.). The Commission made no finding that minerals had not been produced in paying quantities prior to the passage of the 1908 Act;

c. (Resp. Memo. p. 2, footnote 4). The dissenting Commissioners never repudiated the "improper motive theory", but affirmed it. This was the focal point of the Commission's unanimous 1966 decision.

3. By citing *Moore v. Carter Oil Company, Fish v. Wise,* and *35 Op. A. G. 421* (Resp. Memo. p. 4), respondent begs the question of the above gravamen of the case. These two cases,[1] and the Attorney General's Opinion, are based

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[1] These cases involved conveyances made after the passage of Section 11 of the 1908 Act. See *Moore,* pp. 322-324.

upon the 1908 Act itself, and are not based upon the title of the Seminole Nation in one-half of the mineral rights and royalties reserved to the tribe under the 1898 Agreement, before the passage of Section 11 of that Act, and the effect of the *manner* of such passage without the knowledge and consent of the tribe. Moreover, they could not deal with the issue of liability which was created for the first time in 1946 under Clause 5, Section 2 of the Indian Claims Commission Act. The very purpose of the petition is to obtain certiorari in order to resolve the conflict of these two cases and the opinion, with the cases cited in the petition and with respect to the title of the Seminole Nation[2] and liability under said Clause 5.

4. *Goat v. United States* (Resp. Memo. pp. 4-5), dealt only with the question whether restrictions on alienation applied to the interest acquired in surplus lands prior to the 1908 Act, by Seminole Freedmen allottees, who were not of Indian blood, and related solely to the right of occupancy of those allottees. It did not deal with mineral rights and royalties under the 1898 Agreement. That case concerned only "the right to alienate the interest thus acquired", and did not decide the nature of the interest acquired by such allottees prior to the 1908 Act. As stated in the Goat Case, at pages 466-467, the provisions of the 1906 Act, permitting the issuance of Seminole deeds prior to the expiration of the tribal government, did not alter the terms of the 1898 Agreement with respect to tribal title with respect to mineral rights and royalties.

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[2] These cases and the opinion are in conflict with the authorities cited in the petition with respect to the title of the Seminole Nation (Pet. pp. 34-36).

5. *Woodward v. DeGraffenried* (Resp. Memo. p. 5), is not applicable here. That case dealt with Creek allotments under the Creek Agreement and its relation to the Curtis Act of June 28, 1898, 30 Stat. 495, both of which were not applicable to the 1898 Seminole Agreement.

6. *United States v. Jim* (Resp. Memo. p. 5), is applicable, contrary to respondent's contention. That case holds that when a tribe has the right to lease mineral interests, and the funds therefrom are placed into the tribal treasury, to be distributed at a later time equally to tribal members, the title to the minerals and royalties is in the tribe, and not in the individual tribal members. In the instant case, under the 1898 Agreement the leases of mineral interests were to be made by the Seminole Nation, and one-half of the proceeds therefrom were to be placed into the tribal treasury for distribution equally to all tribal allottees after the tribe ceased to exist. In this respect the two cases are similar. The issue of the change in the pattern of distribution in the *Jim Case* has no bearing on the similarity of tribal title in mineral rights and royalties in the *Jim Case* and this case.

7. *Seminole Nation v. United States* (Resp. Br. pp. 5-6), dealt with Article VIII of the Seminole Treaty of 1856, and Section 19 of the Curtis Act, and did not deal with the Seminole 1898 Agreement, and Section 11 of the 1908 Act. As stated in the petition (p. 39), that case held that the conduct of the United States as trustee of the Seminole Nation, in dealings with the Indians, should be judged by the most exacting fiduciary standards; and therefore, the decision of the Court of Claims is in conflict with that case.

Respondent has advanced no reason why the petition in this case should not be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-272

THE SEMINOLE NATION OF OKLAHOMA,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner respectfully petitions the Court for a rehearing on its Order of January 27, 1975, denying the petition for a writ of certiorari to the United States Court of Claims to review that Court's decision of June 19, 1974, 204 Ct.Cl. ___, 497 F.2d ___, which conflicts with the decisions of this Court, its own decisions, and those of the Circuit Courts of Appeal.

Petitioner herein presents substantial grounds and effect not previously presented, based upon the following opinions to show that the Seminole Nation, petitioner herein, had tribal title to one-half of the minerals and royalties from Seminole lands, reserved to it in the Seminole Agreement, approved July 1, 1898, 30 Stat. 567:

1. Felix S. Cohen, *Handbook of Federal Indian Law*, U.S. Dept. of Interior, Office of the Solicitor, Washington, D.C., 1945, p. 313; and
2. *26 Op. A.G. 347, 348* (1907).

1.

Felix S. Cohen has been recognized and relied upon by this Court, the Court of Claims, and by the Indian Claims Commission, as the foremost authority on Federal Indian Law.[1] Mr. Cohen stated:

> "***Further recognition of tribal mineral leases is found in the statutes referred to in Attorney General Stone's opinion, which, in allotting lands, reserved to the tribe the underlying mineral rights.[286] ***."[2]

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[1] Cf. *Creek Nation v. United States*, 318 U.S. 629, 639 (1943); *United States v. Native Village of Unalekleet, et al.*, 188 Ct.Cl. 1, 12 (1969); *Gila River-Pima Maricopa Community, et al. v. United States*, 33 Ind. Cl. Comm. 18, 26 (1974).

In the *Native Village Case*, the Court stated:

> "***Mr. Cohen's standing in the world of legal scholarship would justify a court in citing him as authority in his own right, as it might Williston on a question of contract law or Wigmore on evidence.***"

[2] Cohen's reference is to 34 Op. A.G. 181 (1924), an opinion of Harlan Fiske Stone, later Chief Justice.

Footnote 286 referred to states:

> "***Act of July 1, 1898, 30 Stat. 567 (reserving to Seminole tribe half interest in minerals underlying allotted lands)."

Thus Cohen concluded that under the 1898 Seminole Agreement the Seminole Nation had tribal title to one-half the minerals and royalties in Seminole lands. Moreover, Cohen places the Osage Nation's mineral rights on the same level as those of the Seimnole Nation – both being reserved to the tribe. Petitioner, in its petition (pp. 4, 34-35), cited *In re Dennison*, and *Taylor v. Tayrien*, both Osage cases, as authority to show the conflict between Cohen's opinion with the Court of Claims decision in this Seminole case, with respect to the Seminole Nation's title to the minerals and royalties in Seminole lands.

2.

In 26 Op. A.G. 347, 348 (1907), the Attorney General was concerned with the effect of the Act of 1906 (34 Stat. 137) upon the 1898 Seminole Agreement. The opinion relies upon *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 306, 307 (1902), upon which petitioner also relies, to establish a conflict with the Court of Claims decision in this *Seminole case* (Pet. 4, 16, 32, 33). The *Hitchcock case* held that mineral rights and royalties of the Cherokee Nation were the property of the Nation and not of individual allottees. The Attorney General ruled:

> "There is nothing to differentiate the case of the Seminoles from that of the Cherokees. As said with respect to the latter, whatever title the Seminoles have to their lands is in the tribe and not in the individuals."

Moore and *Fish*, and 35 Op. A.G. 421 (Resp. Memo. in Opposition, pp. 4-5), dealt with situations *after* the passage of the 1908 Act, and did not relate to the title of the Seminole Nation *prior* to the 1908 Act, which is the issue here. These decisions were made before the Indian Claims Commission Act was passed, and were not based upon the new jurisdictional provisions of Clause 5, Section 2 of the Indian Claims Commission Act. The Court of Claims decision herein rested solely upon the issue of title, and failed to remand the case because the 1972 decision of the Commission failed to find that the Seminole Nation lost its tribal title to the minerals and royalties because of the wrongful action of respondent's Commissioner of Indian Affairs in securing the passage of the 1908 Act without the knowledge and consent of the Seminole Nation, as set forth in the 1966 findings of the Indian Claims Commission. This Court has never passed upon these facts under the fair and honorable dealings provision of the Indian Claims Commission Act. As this Court stated in *United States v. Jim*, 409 U.S. 80, 82, fn. 3:

> "We intimate no view as to the rights a tribe might have if Congress were to deprive it of the value of mineral royalties generated by tribal lands."

Petitioner submits that the Court of Claims decision is in conflict with Cohen and with the Attorney General, and that a rehearing should be granted in this case.

Respectfully submitted,

Paul M. Niebell,
Counsel for the Seminole Nation, petitioner

Of Counsel:

Charles Bragmen,
Michael S. Yaroschuk

February, 1975.

CERTIFICATE OF SERVICE

I, Paul M. Niebell, counsel for the Seminole Nation, petitioner, do hereby certify that the above petition for rehearing is presented in good faith, and not for delay, and that the petition is restricted to the grounds above specified.

Paul M. Niebell.